The Koori Court of Victoria:

Addressing Cultural and Language Disadvantage

for Indigenous Offenders in the Criminal Justice System

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Abstract

This thesis addresses an aspect of the problem of the over-representation of Indigenous Australians in the criminal justice system in Victoria. Mainstream methods of punishment over the years have not been demonstrated as effective in lowering the over-incarceration rates of Indigenous (Koori) offenders.

An understanding of the relationship between language and the law is an essential component in the administration of justice, even more so when dealing with disadvantaged offenders. The Koori Court of Victoria provides an alternative forum for Koories, with a more effective way of enhancing the administration of justice processes as they apply to this group of offenders.

The thesis examines the extent to which miscommunication in the courtroom may be one of the barriers to justice in the administration of the criminal law, and contributing to the high percentage of Koories currently in Victorian prisons. The thesis steps outside the mainstream legal process of the courtroom and examines the communicative process between Indigenous speakers and legal practitioners through a more detailed linguistic lens.

A sociolinguistic examination is made of the process and practice of the Koori Court, to identify the extent that this court provides a more culturally appropriate place for Koori offenders to have a voice in the legal system, and whether the enhanced interactive 'sentencing conversation' leads to a more appropriate sentencing outcome for the Koori offender.

The key question guiding the research is to determine the extent that cross-cultural issues of miscommunication, as identified by academics over more than three decades continue to be reflected in the court process. Further it considers the extent that an awareness of cultural and language difference by participants in this particular model of an alternative sentencing court leads to better communication and more appropriate outcomes for offenders.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature:

Natalie Stroud

Date 3rd April 2020

Publications

Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010). In *Australian Law Librarian,* 18 (3) 184-192.

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And lastly, I dedicate this thesis to my beloved husband, Des, who opened my eyes to the wonder of the world, and with whom I enjoyed an amazing life with travel to remote and interesting places, and who gave me a respect for our country and for Australia's Aboriginal people and their rightful place as custodians of the land.

The Koori Court of Victoria:

Addressing Cultural and Language Disadvantage for Indigenous Offenders in the Criminal Justice System

Natalie Stroud 2020

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CHAPTER 1 INTRODUCTION

I Introduction

This thesis addresses an issue inherent in the problem of the over-representation of Indigenous Australians in the criminal justice system. Miscommunication in the formal courtroom continues to be one of the barriers to justice for a Victorian Indigenous (Koori) offender who comes into repeated contact with the law.[1] Mainstream methods of punishment over the years have not been considered particularly effective in lowering the recidivism rate of Koori offenders, or rehabilitating this cultural group which is well recognised as seriously disadvantaged in criminal justice processes for over 200 years.[2] This is in spite of the well-known Report by the Royal Commission into Aboriginal Deaths in Custody in 1991, which found that the 'fundamental causes for over-representation of Aboriginal people in custody were not located *within* the criminal justice system',[3] but were more likely the result of the impact of historical and social determinants on Indigenous peoples.[4]

It is therefore relevant and important to examine the manifestations of power of the legal system in light of its impact on a disadvantaged and over-represented group. In this thesis, I explore the process and practice of the Koori Court of Victoria, to examine to what extent this court provides a culturally appropriate place for Aboriginal offenders to have a voice in the justice system, and whether the enhanced interactive communication of the 'sentencing conversation' in this court, leads to a more appropriate sentencing outcome for the Koori offender. The principal aim guiding this inquiry, is to examine the way people talk in a cross-

[1] For the purpose of this thesis, I have used the term 'Koori' as a distinct term which refers to an Indigenous Australian from the southern states of Australia. The term 'Indigenous' may refer to both Aboriginal and Torres Strait Islander Australians collectively, and Indigenous people more generally. Refer to Monash 'Inclusive Language' guide, at <https://www.monash.edu/about/editorialstyle/writing/inclusive-language>.
[2] Cunneen, C 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' (2014), in Tonry, M, and Bucerius, S, (eds) *The Oxford Handbook of Ethnicity, Crime and Immigration.* Oxford University Press, 386-407.
[3] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Final Report No. 133 (2017), Commonwealth of Australia, 26.
[4] Ibid.

cultural courtroom as it affects Aboriginal speakers. Although there are many justice issues (such as the right to a fair hearing for a Koori offender) which are relevant to this inquiry, they are beyond the scope of this particular thesis.

It has long been established that the 'disadvantage experienced by the Indigenous people of Australia was a direct consequence of their land and waters being forcefully taken and their culture being dealt crippling blow after crippling blow for 200 years and more'.[5] According to Johnston et al, 'little has changed'.[6] This is confirmed by the findings of the Steering Committee for the Review of Government Service Provision in its report, *Overcoming Indigenous Disadvantage: Key Indicators Report, 2016.*[7]

Following the 1991 Royal Commission into Aboriginal Deaths in Custody recommendations[8] that the legal system be adapted to the cultural needs of Aboriginal offenders and their communities, a number of specialist non-adversarial sentencing courts were established throughout Australia, including the Nunga Court in South Australia, the Murri Court in Queensland, the Circle Sentencing Court in New South Wales and the Koori Court in Victoria.[9] The aim of these courts was to provide a more culturally sensitive way of dealing with criminal justice issues for Indigenous people. The Koori Court is unique to Victoria, and incorporates the most effective features of existing models. It was enacted under legislation and established in 2002.[10] This thesis explores its operation and the important part it plays in providing an alternative forum for Aboriginal offenders to have their case heard in the court system.

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[5] Johnston, E, Hinton, M and Rigney, D, (eds) *Indigenous Australians and the Law* (2nd ed, 2008), Routledge-Cavendish.
[6] Ibid.
[7] Steering Committee for the Review of Government Service Provision in its report, *Overcoming Indigenous Disadvantage: Key Indicators Report,* 2016.
[8] Royal Commission into Aboriginal Deaths in Custody (RCIADIC), 1991.
[9] Bennett, P, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (2016), Federation Press, 2-4.
[10] *Magistrates' Court (Koori Court) Act* 2002 (Vic); *Children and Young Persons (Koori Court) Act* 2004 (Vic); *County Court Amendment (Koori Court) Act* 2008 (Vic).

This research is topical and relevant in the wider sphere of the criminal justice system. Contemporary research methodology demands that we incorporate the Indigenous voice in any of our research and analysis that concerns Indigenous people, and I draw upon the work of Anthropologist Professor Linda Tuhiwai Smith, who explores the intersection of two powerful worlds, the world of Indigenous Peoples, and the world of research.[11] Smith considers that 'Indigenous storytelling serves as an historical record and a form of teaching and learning. It is an expression of Indigenous culture and identity'. The findings of this study highlight the value of Indigenous storytelling as an important part of the communicative process in the Koori Court.[12]

My specific focus is on the role the Koori Court plays in addressing communication difficulties experienced by Indigenous offenders who come before the courts as a result of contact with the justice system. The key question guiding this interdisciplinary study of language in the legal domain is to determine if cross-cultural issues of miscommunication continue to be reflected in the court process, or whether an awareness of cultural and language difference of participants at the Koori Court hearing, enhances communication between Aboriginal offenders and the various officers and personnel in the court system.

The Introductory chapter is divided into five sections. Section One, this section, introduces the topic and outlines the framework of the thesis. Section Two provides a background to issues of Indigenous incarceration, with an explanation of factors which may have led to an interaction with the law for Indigenous Australians. Section Three discusses the scope and concepts of the thesis. Section Four defines the methodology of the research, which is an empirical study of language in the criminal justice system. The final section of the chapter summarises the thesis chapters as they progress through the thesis and build the argument.

[11] Smith, L, *Decolonising Methodologies: Research and Indigenous Peoples* (2nd ed, 2012), Zed Books.
[12] For further information on narrative and Indigenous storytelling, see Ch 7, II.

II Background to Issues of Indigenous Incarceration

It is clear that Indigenous Australians remain one of the most disadvantaged groups in Australia.[13] Since the time of initial colonisation, the loss of language, culture and lands has resulted in issues of discrimination, homelessness, unemployment, poor health, lack of education or drug and alcohol dependence.[14] Any one of these factors may contribute to a loss of identity and a sense of poor self-esteem, and lead to an interaction with the law, often with repeat reoffending.[15]

According to Professor Blagg

> many aboriginal people maintain that dispossession, loss of land and culture, the desecration of aboriginal sites, the breakdown of skin and moyete systems (traditional rules for identifying appropriate marriage partners), and the unwillingness of white authorities to acknowledge the jurisdiction of aboriginal law, have *direct and immediate* relevance to both criminal behaviour and to processes of criminalization [16]

Professor Cunneen agrees

> Current criminal justice processes (including risk assessment) continue to single out Indigenous peoples as a 'crime'prone' population. Indigenous demands for greater recognition of Aboriginal law and greater control over criminal justice decision-making must be taken seriously. Neo-liberalism and "law and order" politics are likely further to entrench the over-representation of Indigenous peoples within western criminal justice systems.[17]

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[13] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Final Report No 133 (2017), 189.
[14] Australian Bureau of Statistics, 4704.0. The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples (2005).
[15] Stroud, N, 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria (2006), in Selected papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, at http://www.als.asn.au/proceedings/als2005/stroud-koori.pdf, 2.
[16] Blagg, H, *Crime Aboriginality and the Decolonisation of Justice* (2008), The Federation Press,16.
[17]Cunneen, C, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' (2014), in Bucerius, S and Tonry, M (eds), *The Oxford Handbook of Ethnicity, Crime and Immigration*, Oxford University Press, 386.

The 1991 Royal Commission found that the most significant contributing factor bringing Indigenous people into contact with the criminal justice system was their disadvantaged and unequal position within the wider society.[18] The Report noted

> It is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society. In this way, it is one of the important underlying issues that assists us to understand the disproportionate detention rates of Aboriginal people[19]

The Australian Bureau of Statistics in 2017 estimated that the current number of people identified as Indigenous Australians is 649,171, or 2.8% of the total Australian population of 24,130,000.[20] When this is compared with the number of Indigenous offenders in the corrections system, a total of 11,849, or 28% of the total prisoner population of 29,700, it is clear that there continues to be a disproportionate representation of Indigenous offenders in the Australian prison system.[21] At the last Census, the estimated number of people identified as Indigenous Victorians was 47,788 in a population of 5,926,624, with 7,666 Koories either in Victorian prisons or on remand.[22] Koories remain 12.5 times more likely to be placed in an adult prison compared with non-Indigenous prisoners.[23]

As outlined at the start of this chapter, recommendations made by the Royal Commission into Aboriginal Deaths in Custody were made to address the disproportionate number of Indigenous people in the justice system. As a result of these recommendations, the Victorian

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[18] Cunneen, C, 'Aboriginal deaths in custody: a continuing systematic abuse' (2006), in *Social Justice*, 33.4 (Winter 2006), 38.
[19] McRae, H, et al, *Indigenous Legal Issues: Commentary and Materials,* (4th ed, 2009), Thomson Reuters, 551. (Excerpt from Royal Commission into Aboriginal Deaths in Custody Report (1991), Vol 2, Ch 10, 3).
[20] Australian Bureau of Statistics, Cat. No. 4517.0 Prisoners in Australia, 2017. Aboriginal and Torres Strait Islander Prisoner Characteristics.
[21] Ibid.
[22] Australian Bureau of Statistics, Cat. No. 2017.0. In 2017, Victoria had the largest change in unsentenced prisoners, increasing 22% (or 485) prisoners.
[23] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.* Final Report No. 133 (2017). For further information, see Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), in *Australian Law Librarian*, 18, 3, 184.

Aboriginal Justice Agreement (AJA) [24] was signed between the Victorian government in partnership with the courts and the Indigenous community with the aim to address the ongoing issue of Indigenous over-representation within all levels of the criminal justice system; review cross-cultural awareness training programs; and build relationships between justice officers and local Indigenous communities. [25] It was this Agreement which led to the establishment of the Koori Court program and a whole range of Indigenous justice programs in Victoria, to bring about long-term change.[26]

However, nearly three decades on from the 1991 Royal Commission Report, Australian prisons are overcrowded, with many as repeat offenders. Cunneen observes that 'while the use of imprisonment has increased for all people, the increase is more pronounced for Indigenous people'.[27]

One of the reasons for this may be that changes to legislation in response to a shift in government and public attitudes to crime, have resulted in the imprisonment of people for less serious offences such as driving offences, theft, and substance abuse, with some appearing in court for the first time. Legislation reform enacted to increase punitive measures for punishable offences, such as the abolition of suspended sentences,[28] proposed mandatory minimum sentences and the revoking of parole conditions of prisoners,[29] has further resulted in the overcrowding of prisons. One additional development is the high number of people held on remand awaiting their day in court. Delays in transporting prisoners to the courts

[24] The first Victorian Aboriginal Justice Agreement (AJA) was signed in 2000. Following this, there have been a further three agreements signed by the Victorian government, the courts and the Indigenous community - in 2006, (AJA2), 2013, (AJA3), and 2018, (AJA4), each building on the one before, and with the aim of working together to improve Aboriginal justice outcomes for Aboriginal people in Victoria.
[25] Ibid.
[26] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017), 24.
[27] Cunneen, C and Porter, A, 'Indigenous People and Criminal Justice in Australia'(2017), in Deckert, A, Sarre, R (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, Palgrave Macmillan, 667-682.
[28] *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters)* Act 2013 (No.32 of 2013), enacted as part of the Victorian government's 'tough on crime' policy.
[29] *Corrections Amendment (Parole Reform) Bill* 2013.

causes a stress on the court system, with the increased number of cases scheduled to be heard in a day.[30]

The Final Report of the 2017 Australian Law Reform Commission on the Inquiry into the Incarceration of Aboriginal and Torres Strait islander Peoples, identifies further factors other than social determinants of incarceration, which have impacted on Aboriginal and Torres Strait Islander peoples.[31] These include indicators of disadvantage in education and employment, health and disability, housing and homelessness, child protection and youth justice. This supports the argument expressed in this thesis that imprisonment does not appear to have an impact on the crime rate.[32]

The design and implementation of the Koori Court attempts to address some of these social and historical factors which reflect the disadvantage experienced by Aboriginal people. This is noted in the 2017 Report of the Australian Law Reform Commission, which commended the Koori Court and community justice groups of Elders for their support and assistance to Aboriginal and Torres Strait Islander people as they pass through the criminal justice system.[33]

The Koori Court operates under the jurisdiction of the Magistrates' Court of Victoria, within the parameters of the traditional adversarial system, but in a culturally sensitive and less formal manner. The Koori offender must satisfy a number of criteria to have their case heard in this court, for example, they must be Aboriginal; plead guilty to the offence; and promise to take responsibility for their actions.[34] By taking the time to hear the story behind the offence, and with the participation of all at the 'sentencing conversation' (including Indigenous Elders

30 Barson, R, 'A failure of justice' (2019), *The Age*, Melbourne, 7 July 2019, 32.
31 Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017), 22.
32 Australian Bureau of Statistics, Cat. No. 4517.0 Prisoners in Australia, 2017.
33 Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133, 24.
34 *Magistrates' Court (Koori Court)* Act 2002.

of the local community), factors behind the offence may be revealed. The Magistrate is able to then take fuller information into consideration prior to sentencing.[35]

III Scope of the Research

The scope of this research is to examine the extent that communication in the Koori Court enhances the perception of justice for an Aboriginal offender facing sentencing at the Magistrates' Court level in Victoria.

Using an interactive sociolinguistic approach, I compare language in the conventional courtroom, where miscommunication may occur between Indigenous offenders and various officers and personnel of the court system, with language used in the culturally sensitive Koori Court. My aim is to identify if the interactive, participative courtroom discourse in this court, delivers a better perception of justice for an Indigenous offender. Of paramount importance is the inclusion of Indigenous Elders in the court process, as they facilitate the cultural conversation.

A comprehensive discussion of linguistic issues in the courtroom is explained further in the Linguistics Chapter 4, III-IV. The chapter examines the role of language in the legal domain, the cross-cultural communicative process of the Koori Court, and linguistics features which may be problematic for Indigenous defendants in the more formal mainstream court.

A number of courts were initially selected for the study including mainstream courts and Koori Courts in the Magistrates' Court and County Court jurisdictions, in regional, urban and city locations for geographical variation. I observed over 200 court hearings over several years of the part-time project, recording several complete court hearings, and audio-

[35] According to the *Magistrates' Court (Koori Court)* Act 2002, the purpose of the Act was not specifically established to reduce recidivism, but with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal Elder or Respected Person and others. The Koori Court fulfils this requirement.

recorded interviews with participants.[36] The research scope was narrowed to the Magistrates' Court jurisdiction alone for concision and to bring greater depth and focus. Participants comprised members of the Indigenous community, Koori Elders, Magistrates, defence lawyers, police prosecutors, Koori Court officers, defendants, court and support staff. Audio-recorded semi-structured interviews were carried out in accordance with Monash Ethics approval.[37] All recordings were transcribed and linguistically analysed and form the basis of my findings.

Terminology used throughout the thesis is in accordance with the Monash University guidelines on the use of inclusive language.[38] That is, I use the term Aboriginal to refer to Indigenous people of mainland Australia or the Torres Strait Islands. I use the term Koories to denote a group of Indigenous Australians who identify with a specific area and language, in the southern part of Australia. As a non-Indigenous researcher, I acknowledge that although I bring an awareness to the topic, I will never be able to do more than record the experiences of Indigenous participants and amplify their voice. My role is therefore to bring a linguistic perspective to the topic and apply this to any difficulties of communication which may occur in the courtroom, to show how specialist courts such as the Koori Court can play a part in improving the perception of justice for an Aboriginal offender.[39]

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[36] A number of mainstream courts were attended at the start of the research. However it was not possible to observe comparable instances between mainstream courts and the Koori Court, as it was difficult to ascertain in the mainstream court whether a defendant was Aboriginal or not. A strict comparison also required a guilty plea. It was therefore necessary to conduct a comparison of the courts by referring to the large amount of published literature available on difficulties of communication which may be experienced by Indigenous offenders in the justice system (for further information, see Ch 5, VII).

[37] Monash Ethics Approval Number CF13/2103 – 2013001097.

[38] As noted at the beginning of this chapter, I generally follow the Monash University Guidelines on inclusive language when referring to Indigenous Australians in this thesis. These Guidelines are found at <http://www.monash.edu/about/editorialstyle/writing/inclusive-language>.

[39] We measure perception by analysis of people's behaviours and verbal testimony. An example of 'perception' is seen in Ch 7, footnote 91, Transcript T9.34 (D), in a response by a Koori defendant, who spoke in the Koori Court about how he perceived the difference in this court to the mainstream court. He said that 'with the mainstream court, (…) it's not personal (…) to them, it's a business', whereas in the Koori Court, 'they're not just dealing with a number, they're dealing with their ow kind'.

IV Methodology

In this interdisciplinary study, I examine the communicative process between Indigenous speakers and legal participants in Victorian courts of law. My core inquiry is to identify to what extent communication is enhanced or inhibited for Aboriginal offenders who have their case heard in the Koori Court.

Language in the legal domain is examined, in particular interaction between legal participants and Aboriginal offenders in the courtroom, in instances where there may be disadvantage before the law due to language and cultural differences. I draw on a background of forensic linguistics, the study of the relationship between language and the law.[40] I have chosen interactional sociolinguistics as the optimal theoretical framework for analysis of the data, also drawing on ethnography of communication to support my findings. Attention is given to the wider socio-cultural context where different patterns in speech may reveal difficulties of understanding for the Aboriginal offender in a mainstream courtroom. A microanalysis of the courtroom discourse, using a sociolinguistic approach is then carried out to determine the extent that communication may be enhanced in the Koori Court as a cross-cultural courtroom.[41]

The overall scope of the data is explicitly set out in Chapter 5, Section IX-X. Data on the language examined is collected and classified, and discourse methods for analysis outlined (also see Chapter 4, III and IV. The data is primarily descriptive in line with the qualitative approach of the study, based on observation of subtle and culturally encoded patterns of

[40] In its broadest sense, "forensic linguistics" covers all areas where law and language intersect. For the purpose of this study, I apply a narrow interpretation of forensic linguistics which includes language in the legal process such as courtroom interaction and language and disadvantage before the law. For further information, refer to the International Association of Forensic Linguists web site at <https://www.iafl.org/forensic-linguistics>. The field is explored further in Chapter 4.

[41] These methodological issues are explained and explored in Chapters 4 and 5. Chapter 5, VII-IX, provides the research plan of the study, and includes the collection of data, face-to-face interviews with participants and attendance at court hearings, many audio-recorded and all transcribed. These are then coded, classified and analysed in Chapter 5, X, and conclusions drawn in the 'Findings' Chapters 6 and 7.

speaking which are then analysed for patterns of difference in the cross-cultural communication.

V Thesis Chapters

This thesis examines a particular institutional response to cultural and language disadvantage experienced by some Indigenous offenders in the Victorian criminal justice system. I argue that one of the reasons may be a lack of awareness of cultural and language differences in the conventional courtroom which may lead to miscommunication, causing disadvantage for the offender, and consequential repeat offending. Accordingly, it is necessary to examine the language used in the Koori Court, with a comparison of the more formal language of the mainstream court.

The following chapters outline the framework of the thesis, and the measures taken to highlight the difference between the two systems. The study examines the interaction of participants and the engagement of the Koori offender in the court process, and the impact this may have on the potential sentencing outcome.

Thus, the thesis takes shape in four steps.

The first step of the thesis comprises **Chapter 1**, this Introduction, which sets out the framework of the thesis and the background to the problem.

The second step groups together the next three chapters of the thesis, which elicit the interdisciplinary nature of the research. **Chapter 2** reviews some key aspects of the Australian Indigenous legal relations with the criminal justice system, paying attention to some of the significant milestones which have had a marked impact on Indigenous Australians in their struggle to overcome a history of colonial dispossession following more

than 200 years of European settlement.[42] The significance of this struggle is illuminated with some examples I have chosen by leading Indigenous and non-Indigenous legal scholars, to illustrate the ongoing quest for an Indigenous voice searching for equality and recognition.[43]

Chapters 2 and 3 provide essential historical background to the 230 years of disadvantage experienced by Aboriginal people and draw attention to key events and legal reports such as the RCIADIC Report (1991) and the ALRC Final Report (2017). These reports focus on important issues which underpin contemporary problems in the justice system. Recommendations by the RCIADIC led to an agreement between the Victorian government, the courts and the Aboriginal community to improve justice outcome for Koories, and this led to the establishment of the Koori Court of Victoria (see Chapter 3 for a full description of the work of the Koori Court).

In **Chapter 3** of the second step, I set out the origin of the Koori Court and its place in the hierarchy of the Victorian justice system. The Koori Court has a strong commitment to provide a non-adversarial forum for Indigenous offenders in a less formal and more culturally appropriate setting.[44] According to Harris, the Koori Court seeks to incorporate a 'cultural dimension into sentencing so as to address the underlying causes of criminality in the

[42] Several key reports and recommendations which provide a background to the contemporary problems faced by Indigenous people in the justice system are included in this chapter, such as the Royal Commission into Aboriginal Deaths in Custody Report, 1991; the Australian Human Rights Aboriginal and Torres Strait Islander Social Justice Commissioners' Reports 1993-2017; and the Australian Law Reform Commission Final Report, 2017.

[43] Watson, I, *Aboriginal peoples, colonialism and international law: raw law* (2015). Routledge; Watson, I, *Re-Centring First Nations Knowledge and Places in a Terra Nullius Space*, (2014); Waller, L, 'Elizabeth Eggleston, Aborigines, and the Law' (1984), in Hanks, P, and Keon-Cohen, B (eds), *Aborigines & The Law,* George Allen & Unwin, 306; Behrendt, L, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003), The Federation Press; Langton, M, et al, (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (2004), Melbourne University Press; Langton, M, 'Anthropology, Politics and the Changing World of Aboriginal Australians' (2011), in *A Journal of Social Anthropology and Comparative Sociology*, 21, <https://doi-org.ezproxy.lib.monash.edu.au/10.1080/00664677.2011.549447>; Langton, M, 'A Tragedy of Dumb Politics: Does Mandatory Sentencing Cause Fundamental Damage to the Legal System?' (2000), in Hossein, E, Worby, G, and Tur, S, (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (2016), The Federation Press, 62-75; Johnston, E, 'The Royal Commission into Aboriginal Deaths in Custody: Looking forward, looking backwards' (2nd ed, 2016), in Johnston, E and Hinton, M, (eds) *Indigenous Australians and the Law*, Routledge-Cavendish, 9.

[44] See Operating Manual of the Koori Court, (2005), Broadmeadows, 8.

individual'.[45] It is important to note that this thesis situates the Koori Court in the justice system from an interdisciplinary perspective rather than a strict formalistic legal perspective. My focus is on legal issues viewed through a sociolinguistic lens, with broad reference to social science. King explains how the ideas and practices of other social disciplines have added to the depth of legal thought.[46] He notes that Indigenous courts are 'built on notions of cooperation rather than conflict'.[47] My data supports this approach.

As previously mentioned, one of the main developments for Indigenous justice in Victoria is the partnership agreement between the Victorian government, the courts and the Koori community to improve justice outcomes for Koories.[48] Central to the establishment of the Koori Court, outlined in the *Magistrates' Court (Koori Court) Act* 2002*,* is 'the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal elder or respected person and others'.[49] The Elders provide an Indigenous speaking style and cultural knowledge to court proceedings. They have a wide knowledge of Indigenous cultural history and community families, and can play a part in reconnecting the offender to their Indigenous culture. The emphasis of the court is on a therapeutic outcome, with rehabilitation of the offender rather than punishment.

The chapter examines measures taken so far by the justice system to address the problem of the increased number of Koories in the prison system, and suggests that there is a need for 'new ways of doing justice' which redress some of the disadvantages experienced by Indigenous Australians which bring them in contact with the law, not only historically, but also in the courtroom.[50] I attempt in this chapter to review more appropriate strategies

[45] Harris, M, 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) in King, M, and Auty, K, (eds) *The Therapeutic role of Magistrates' Courts*, 130.
[46] King, M, 'Judging, judicial values and judicial sentencing courts and mainstream courts' (2010), in *Journal of Judicial Administration,* 19, 3, 133-159.
[47] Ibid.
[48] Victorian Aboriginal Justice Agreements, 2000, (AJA), 2006,(AJA2), 2013, (AJA3)and 2018 (AJA4).
[49] *Magistrates' Court (Koori Court) Act* 2002.
[50] King, M, A, Batagol, B and Hyams, R, *Non-Indigenous Justice* (2009), Federation Press, 1.

rather than punitive solutions to crime. One such measure is the concept of justice reinvestment, a strategy for reducing the number of people in the prison system, where governments redirect funds spent on the building of new prisons into community activities in high-incarceration neighbourhoods to address the underlying causes of crime.[51]

The last chapter of the second step, **Chapter 4,** then examines linguistic features of communication in the Koori Court, setting the scene for the research project and findings. This chapter endeavours to step outside the mainstream legal process of the courtroom, and view the communicative process and interaction between Indigenous speakers and legal professionals in Victorian courts of law, through a more detailed linguistic lens.[52] The key question guiding the research is to determine if cross cultural issues of miscommunication continue to be reflected in the court process, or if an awareness of cultural and language difference by participants in the alternative Koori Court hearing leads to better communication, with a more restorative and therapeutic outcome for both Indigenous offenders and the community and a reduction in reoffending.

Interactional Sociolinguistics is the optimal theoretical framework for analysis of the data, drawing on ethnography of communication to support my findings. Attention is given to the wider socio-cultural context where different patterns in speech may reveal difficulties of understanding for the Aboriginal offender in a mainstream courtroom.

I acknowledge the concerns raised in legal and linguistic scholarship over the past four decades regarding the cultural and language disadvantages experienced by Indigenous Australians in the formal court context.[53] Of particular relevance to this research, is the

[51] Schwartz, M, Brown, D, Cunneen, C,' Justice Reinvestment', *Indigenous Justice Clearinghouse*, Brief 21, June 2017.
[52] Part II discusses the theoretical underpinning of the research, while part V demonstrates how the theory is put into practice in the Koori Court. Some overlap is therefore inevitable, but it is desirable to keep these two sections separate. The complexity of the linguistic and legal examination of communication in the legal domain means that details need to be repeated so that the context of both domains is properly understood.
[53] The thesis draws upon the work of key legal scholars such as Freiberg, A, 'Problem Oriented Courts: Innovative Solutions to Intractable Problems?' (2001), 11 *Journal of Judicial Administration* 7; McRae, H, Nettheim, G, Anthony T, Beacroft, L, Brennan, S, Davis, M, and Janke, T, *Indigenous Legal Issues:*

seminal work of Diana Eades, who examined miscommunication between Aboriginal speakers and legal practitioners in many legal domains.[54] In this study, I examine specific linguistic features which may be problematic in a cross-cultural situation, and offer measures which may ameliorate this.

The chapter draws on the analytical framework of Interactional Sociolinguistics, founded on the work of anthropologist and linguist John Gumperz, which is closely related to the field of ethnography of communication.[55] Theoretical principles are also drawn from the area of Speech Act Theory, developed by the philosopher John Austin[56] and later refined by John Searle[57] who studied the effect of utterances on the behaviour of speaker and hearer.

Chapter 4 concludes that while accepted linguistic theory may provide an answer for miscommunication in some contexts, there must be a different way of analysing interaction between interlocutors who do not necessarily share the same cultural background in a context such as the courtroom.

The third step in the thesis comprises **Chapter 5,** the research methodology**,** in which I examine the communicative process between Indigenous speakers and legal practitioners in

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Commentary and Materials (2009), (3rd ed), Thomas Reuters; Auty, K, 'We teach all hearts to break – but can we mend them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006), 1 elaw Journal (special series) 101. <https://elaw.murdoch.edu.au/archives/special_series.html>; King, M, Freiberg, Batagol, B, and Hyams, R, (eds), *Non-Adversarial Justice* (2009), The Federation Press.
For linguistic scholarship, I draw upon the work over three decades of Liberman, K, 'Understanding Aborigines in Australian Courts of Law' (1981), 40 *Human Organization: Journal of the Society for Applied Anthropology* 247-255; Cooke, M, 'Aboriginal evidence in the cross-cultural courtroom' (1995), In D. Eades (ed). *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia,* University of New South Wales Press, 55-96; J. Gibbons, J, *Forensic Linguistics: An Introduction to Language in the Justice System* (2003), Blackwell Publishing, 162-227.

[54] Eades, D, 'Legal recognition of cultural differences in communication: the case of Robyn Kina'(1996), 16 *Language and Communication,* 215-227; Eades, D, 'Language and disadvantage before the law' (2008), in Gibbons, J and Teresa Turell, M, (eds), *Dimensions of Forensic Linguistics,* John Benjamins Publishing Company; Eades, D, 'Communicating with Aboriginal Speakers of English in the Legal Process', (2012), In *Australian Journal of Linguistics*, Routledge, 32, 4, December 2012, 473-489; Eades, D, *Aboriginal Ways of Using English*, (2013), Aboriginal Studies Press.

[55] Gumperz, J, 'Interactional Sociolinguistics: A Personal Perspective' (2003), in Schiffrin, D, et al, *The Handbook of Discourse Analysis*, Blackwell Publishing 215-228.

[56] Austin, J, *How to Do Things with Words* (1962), Oxford University Press.

[57] Searle, J. *Speech Acts: An Essay in the Philosophy of Language* (1969), Cambridge University Press.

Victorian courts of law, drawing on a background of forensic linguistics which covers all areas where law and language intersect.

The methodology involves field work in the form of attendance at a number of court hearings over several years in urban, regional and city locations. Using an empirical approach, I examine language in the legal domain, in particular interaction between legal practitioners and Aboriginal offenders in the courtroom, in instances where there may be disadvantage before the law due to language and cultural differences.

Participants are asked a number of research questions, with responses thematically grouped and analysed under a number of broad categories, to compare how participants respond to cross-cultural communication. A microanalysis of the courtroom discourse, using a sociolinguistic analysis approach, is then carried out to determine the extent that communication may be enhanced in a cross-cultural courtroom, such as the Koori Court.

The fourth step of the thesis comprises three chapters containing my Findings and Conclusion. **Chapter 6,** endeavours to bring to life some of the voices previously unheard in the court system, while **Chapter 7,** demonstrates the importance of 'listening to the voices' to enable an awareness and understanding of cultural and language difference in the legal domain. **Chapter 8** concludes the thesis.

The Findings Chapters 6 and 7 complement each other. The importance of Chapter 6 is that it demonstrates one of the main findings of the study (with case studies), that an accused person has a **'voice'** in the court system. Chapter 7 highlights the importance of **'listening to the voices'** in the courtroom. The chapter draws together the findings of the four key themes of inquiry and examine how the Koori Court adapts specific language features for improved communication and compares this to the linguistic theory in Chapter 4.

With its title of 'Voices from the Courts', **Chapter 6** emphasises that in this court, the Aboriginal offender now has a voice. This culturally sensitive Koori Court is a forum where all participants are equal around the table, and where Aboriginal offenders now have a voice and may contribute to the 'sentencing conversation'. The chapter presents case studies that give an example of the experience of defendants when they come to the Koori Court, and compares this with their experience in the more formal mainstream court process. An interpretation is given on how communication may be enhanced when there is time to speak during the court process, and when an awareness of cultural and language difference is recognised.

This chapter addresses a number of research questions on the extent to which communication is enhanced in the Koori Court. It details my observation at court hearings, together with transcripts of courtroom discourse, and the responses of interviewees to questions on communication. The chapter highlights some of the voices heard in the criminal justice system and the impact the Koori Court has on an Aboriginal offender, where they now have a voice in the process. It is clear that each has a part to play in the communicative process. Of course, the participation of Indigenous Koori Elders is paramount to the conversation. One defendant who had previously gone through the mainstream court, with time spent in a number of different prisons, finally came to the Koori Court, where he said the Koori Elders made a big difference.

> It's not like I've got court – that anxiety of – not knowing what's going on
>
> In the mainstream court (…) to them it's a business (…) whereas in the Koori Court it's personal, and they're not just dealing with a number – they're dealing with their own kind
>
> You hear it from them, so it's – you don't want to come back and disappoint[58]

The next chapter in this fourth step, **Chapter 7,** demonstrates the importance of 'Listening to the Voices' so that there may be an understanding of broader social issues. The chapter

[58] Transcript T9.34 (D).

identifies any underlying factors which may have contributed to the offence, such as lack of housing, poor health, lack of education or drug and alcohol issues. It then examines the extent to which the Koori Court attempts to provide a culturally appropriate and sensitive approach to communication in the criminal justice system.

This chapter uses a thematic analysis of participant's responses to a series of questions on communication which is then given a linguistic interpretation. Thematic responses to questions regarding the four key areas of investigation provide a macro-cultural picture of communication as it occurs in this court. Using an interactive sociolinguistic approach to evaluate actual language used during the 'sentencing conversation' in the Indigenous Koori courtroom, this is compared with the more formal language used in the mainstream court.

One of the court support workers who responded to a question on the importance of 'listening', agreed

> I think that there is a lot of listening that happens around the table which is really important, and especially when the client is given the opportunity to talk, like when everyone sits back and there's just the client and everyone's listening to their story, and you know that's validating the person with a consensus and I think that's really important[59]

The last part of the thesis is **Chapter 8**, which provides an overview of the problem which led to the research, and a summary of the way this qualitative study identifies communication difficulties which may be experienced by Koori offenders in the formal court system, and how these are ameliorated in the Koori Court.

The chapter emphasises that the Koori Court as a 'safe place' for Koori defendants to tell their story, and the interaction of all at the 'sentencing conversation' who listen to the story and offer support, has a marked impact on both the sentencing outcome and the perception of justice for Aboriginal offenders.

[59] Transcript T8.63 (S).

This thesis fills a gap in knowledge on issues where miscommunication in the courtroom may have contributed to the over-representation of Indigenous offenders in the criminal justice system. It adds to the body of knowledge by demonstrating that the restorative and therapeutic approach of the Koori Court improves upon the Indigenous experience in the court system.

In drawing together the chapters that comprise this thesis, the underlying proposition is that the Koori Court is an appropriate and effective way of enhancing the administration of justice processes as they apply to Indigenous offenders. Although it is not a perfect process, the enhanced communication provides a strong foundation for proper application of criminal justice processes for the Indigenous community in Victoria.

CHAPTER 2 AUSTRALIAN INDIGENOUS LEGAL RELATIONS

I Introduction

This thesis focuses on communication in the Koori Court, and the extent that it meets a particular need for Indigenous centred communication in the context of the administration of criminal justice, in Victoria. That discussion, and evaluation must be situated in the context of Indigenous-Settler relations, and the ongoing impact of the colonial and postcolonial dispossession of the Koori peoples of Victoria, and of Indigenous Australians generally. There is not the need, nor the scope in this thesis to elicit the full history of Koori dispossession, it is well known and set out elsewhere. However, it is necessary to set the scene by drawing attention to certain key events or periods which frame the last 230 years of Anglo-Australian dominance in the legal landscape. It is also relevant to highlight two important legal reports, the Royal Commission into Aboriginal Deaths in Custody,[1] and the Australian Law Reform Commissions report into Aboriginal incarceration.[2] These have had a particular impact on the way laws and criminal justice have been addressed in the recent decades, thus they underpin much of the rationale and meaning of the Koori Court (and similar courts in other Australian jurisdictions).[3] This chapter thus refers to significant contributions of leading Indigenous and non-Indigenous scholars in the context of these historical periods, in addition to key reports reflective and engaged with the progress of Indigenous relations with the criminal justice system in Victoria.

The chapter is divided into six sections commencing with this Introduction. Section Two focuses on the background of some of the key milestones in colonial policy, with the aim of eliciting the issues and processes that underpin contemporary problems in the criminal

[1] Royal Commission into Aboriginal Deaths in Custody, (RCIADIC), 1991.
[2] *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* Australian Law Reform Commission (ALRC) Final Report 2017, No.133, Australian Government.
[3] Following the Royal Commission in 1991, a number of specialist Indigenous courts were established around Australia. These included the Nunga Court in South Australia, Murri Court in Queensland, Circle Sentencing courts in New South Wales, the Koori Court in Victoria, also Community Courts in Western Australia and Northern Territory.

justice system, as it engages and deals with Koori people.[4] Section Three turns to the RCIADC, which was a landmark event in its confrontation of the structural and institutionalised discrimination against Indigenous offenders around Australia. It set out fulsome recommendations which were intended to address continuing injustices within the criminal law system, yet were not meaningfully enacted, perpetuating the continuing over-representation of Aboriginal offenders in the justice system. Section Four provides an overview of the 1990s and 2000, in the context of the work of the Australian Human Rights Commission's Social Justice Commissioner's work, particularly the reports by Commissioners Dodson, Calma and Gooda. Then Section Five considers the 2017 ALRC report, some 20 years after the RCIADC, and explores certain key recommendations, that are relevant to the research in this thesis.[5]

Where possible in this chapter I draw upon Indigenous perspectives when examining the continuing disadvantage of Aboriginal Australians in the context of Australian Indigenous legal relations with the criminal justice system. I also highlight key non-Indigenous scholarship where it has been instrumental in driving forward relevant justice reforms. Much of Australia's legal and social history is constructed from the perspective of the Anglo-Australian standpoint, but there are important Indigenous voices that have critical and constructive perspectives on the criminal justice system. As my research project attempts to illuminate the Indigenous 'voice' in the court context, I have also engaged with the Indigenous scholarship where possible, to amplify these perspectives.

Contemporary research methodology demands that we incorporate the Indigenous voice in any of our research and analysis that concerns Indigenous people. Linda Tuhiwai Smith in 'Decolonising Methodologies: Research and Indigenous Peoples', explores the intersection of two powerful worlds, the world of Indigenous peoples and the world of research.[6] Smith urges researchers of Indigenous peoples to follow practices that are more respectful, ethical, sympathetic and culturally appropriate, than in the past. Archibald, Morgan and De Santolo also embrace a research methodology with a

[4] Elder, B, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788* (1988), Child & Associates Publishing.
[5] ALRC Final Report 2017, No. 133, Australian Government.
[6] Smith, L, *Decolonising Methodologies: Research and Indigenous Peoples* (2012), (2nd ed), Zed Books.

particular view of the place of the Indigenous voice.[7] Archibald et al refer to the importance of listening to stories as a research methodology. In my research, I am mindful that this methodology of listening to the Indigenous voice is essential for understanding the manner that criminal justice is understood and administered.[8] For these reasons I have sought to engage with the leading scholars in this context, to provide an overview that frames the subsequent discussion.

II Background (19 – 20th Century Context)

Historian Bruce Elder wrote in 1988 about the colonial massacres and 'pacification' of Aboriginal people in Australia, urging then that the collective Australian history must be explicit about death and displacement of Indigenous Australia, as we are about 'heroic' events such as the arrival of the First Fleet, early Australian explorers, the gold rushes and the bushrangers.[9] Historian Henry Reynolds also was explicit about what he described as the 'frontier wars'; in over a dozen scholarly books Reynolds catalogues the extraordinary levels of violence and conflict of colonisation of Australia. [10]

Captain James Cook and naturalist Joseph Banks reported contact with the Eora of New South Wales from the very first date of their exploratory voyage up the East Coast of Australia.[11] The retelling of early stories of confrontation bring some belated[12] level of

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[7] Archibald, J, Morgan, J, and De Santolo, J, (eds) *Decolonizing Research: Indigenous Storywork as Methodology* (2019), Zed Books.

[8] See Chapter 7 of this Thesis, 'Listening to the Voices', for my analysis and discussion of communication in the Indigenous courtroom.

[9] Elder, B, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788* (1988), Child & Associates Publishing. This book was written on the bi-centennial of the arrival of the First Fleet into Botany Bay and gives an accurate version of the scale of the atrocities committed to Aboriginal people during the early contact of European settlers, which counters the sanitized version of many westernized records.

[10] Reynolds, H, (ed) '*Aborigines and Settlers: the Australian Experience, 1788–1939,* (1972); Reynolds, H, *Frontier: Aborigines, settlers and land* (1987, Allen & Unwin; Reynolds, H, *Dispossession; Black Australia and White Invaders* (1989), Allen & Unwin; and more recently Reynolds, H, *Forgotten War* (2013, NewSouth Books. Keith Windschuttle sought to undermine Reynold's historical claims in *The Fabrication of Aboriginal History, Volume One: Van Diemen's Land 1803–1847* (2002), Macleay Press.

[11] Elder, B above, n 9.

[12] I use the term (belated) advisably, when speaking of the level of awareness to the Australian consciousness. The non-Indigenous Australian is only recently hearing true stories of the early days of European settlement from an Indigenous perspective. See an example of Australian histories of these relations, Henry Reynolds *Frontier: Aborigines, settlers and land* (1987), Allen & Unwin.

awareness to the Australian consciousness of the scale of the massacres of Aboriginal people in early settlement activities justified by the colonial expansion.[13]

Although Australia was claimed for King George III by Captain Cook in 1770, and settled by Governor Phillip in 1788, the first British presence did not arrive in what we know as Victoria until the early 1800's. The first (unsuccessful) settlement was in 1803, when a small group of convicts under Lt. David Collins were sent Sorrento to defend Bass Strait against the French.[14] Following a clash with the Wathaurong people near Corio Bay, and killing their leader, the settlers left for Tasmania, with no successful settlements in Victoria until the 1830s.[15]

Of course, the European presence in the state of Victoria irrevocably changed Aboriginal people, their tribal polity and their expression of their legal systems.[16] Through the early 1800's there was considerable forced movement of Aboriginal people around Victoria separating tribal communities and family groups. Exploration, settlement and then pastoral expansion dispossessed Aboriginal people from their lands, conflict over resources and access to land use ensued.[17] For example, the 'Convincing Ground' massacre occurred in Portland Bay in 1833 or 1834 in a resources dispute between whalers and the Gunditjmara people. This is probably the first documented massacre in Victoria.[18]

Elizabeth Eggleston's ground-breaking book, *Fear, Favour or Affection*, laid the foundations for research and scholarship in the early 1970's on the interaction of Aboriginal people with the criminal justice system.[19] During her intensive fieldwork conducted in Victoria, South Australia and Western Australia, Eggleston examined the

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[13] Elder, B above, n 9.
[14] Broome, R, *Aboriginal Victorians: A History Since 1800,* (2005), Allen & Unwin, 4-5.
[15] Ibid.
[16] Ibid, 17.
[17] Ibid, 35.
[18] Clark, I., *Scars on the Landscape. A Register of Massacre sites in Western Victoria 1803-1859*, (1995), Aboriginal Studies Pres, 17-22. See also Professor Lynette Russell, *The Convincing Ground Pt 1- Message Stick* (19 Feb 2007) accessed at https://web.archive.org/web/20121108111943/http://www.abc.net.au/tv/messagestick/stories/s1869519.htm.

[19] Eggleston, E, *Fear, Favour or Affection* (1976), Australian National University Press, Volumes 1 and 2.

administration of not only special legislation but also the administration of criminal law as it affected Aboriginal people. She found that participation by Aboriginal people in decision-making in the judicial process and process of legislation is even more important than consultation by whites with Aboriginal people.[20] She concluded that 'only when the social and economic status of Aboriginal Australians has been raised to a level comparable with that of the majority of the community, will it be possible to abolish all preferential legislation conferring on them a special legal status'.[21] Eggleston's work is particularly relevant to my thesis, as my own field-work was similarly based on collecting data from actual face-to-face interviews and audio-recordings of court cases in order to listen to the personal stories of Aboriginal speakers as they told stories of their lives and experience in the justice system.[22]

Colonial expansion in Victoria, as with the rest of most of Australia, resulted in the suppression of Aboriginal culture, values and language, and later the break-up of families and the removal of children in the name of 'civilizing' or 'pacifying' the first peoples.[23]

Indigenous Law Professor Irene Watson, a leading scholar and activist in Indigenous relationships with criminal law, has published extensively on the impact of colonialism on Indigenous people.[24] Watson draws from a lifetime of personal and scholarly knowledge gathered from Indigenous relations, Elders and First Nations Peoples about the place of Aboriginal people in Australia.[25] She provides a perspective on colonial history in Australia, which has denied First Nations identity as subjects of International law. Watson explains that the 'crimes of colonialists were legally sanctioned and normalised by international law, while the ways of Aboriginal people were demonised and considered in need of civilising, changing, and assimilating'.[26]

[20] Ibid, 319.
[21] Ibid, 321.
[22] See Ch 5, Methodology IX, pages 7-11 for a discussion of my fieldwork, which ties in with Eggleston's seminal work on collecting data.
[23] Broome, R. *Aboriginal Victorians: A History Since 1800,* (2005), Allen & Unwin.
[24] Watson, I, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (2015). Routledge.
[25] Ibid, 5.
[26] Ibid.

Watson points out that from the Indigenous perspective 'colonisation was a violation of the code of political and social conduct embodied in Raw Law'.[27] Its effects were destructive, forcing Aboriginal peoples to 'violate their own principles of natural responsibility to self, community, country and future existence'.[28] Watson's work is an essential contribution to our understanding of dispossession as she explicitly decentres our tendency to privilege the dominant assumptions and concepts of Anglo-Australian law and legal history.

Her key work *Aboriginal People, Colonialism and International Law,* is self-evidently written from the viewpoint of Aboriginal law, rather than from the dominant Western legal tradition of so many other legal texts.[29] Watson describes how the Aboriginal legal system is embedded in Aboriginal people's complex relationship with their ancestral lands. When compromised, this may lead to a violation of their own principles and responsibility to self, community and country.[30] Although Watson expresses concern about the damaging effects of colonisation, the key piece relevant to this thesis is that Watson explains some of the cultural and language difficulties which may be experienced by Indigenous defendants when in the legal system, which may lead to miscommunication when court orders cannot be complied with due to cultural obligations and taboos.[31] My research shows that the Indigenous Koori Court, as a forum where Koori defendants come before the Magistrate and Elders of their community, recognises the Indigenous communicative style, and complies with the philosophy and cultural knowledge of both western and Indigenous law.[32]

Watson critically reviews the impact of colonisation on the First Nations of Australia, beginning with the mechanisms which put in place 'terra nullius' which provided the

[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid, 29-30.
[31] Ibid. Also see Watson, I, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014). In *AlterNative: An International Journal of Indigenous Peoples*, Sage Publishing, Vol 10, 5.
[32] Stroud, N, 'Non-Adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012). In Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, edited by Tomlin, S, Macleod, N, Sousa-Silva, R and Coultard, M, Birmingham, UK, 115-125, at http://www.forensiclinguistics.net/iafl-10-proceedings.

imperial British to 'lawfully settle' and dispossess the First Nations from their lands.[33] Watson writes with a personal insight into the marginalisation of Indigenous people which has interfered with their capacity to remain connected to their country and family. She proposes a re-centring of Aboriginal law, philosophy and knowledge, but notes that there will be challenges.

Another notable contributor to our understanding of the relationship between colonisation and criminalisation of Indigenous communities, is leading criminologist Chris Cunneen, who has written extensively on the causes of Indigenous incarceration.[34] In a series of different works spanning 20 years, he explores the role of native police, the characterization of Aboriginal resistance to Anglo-Australian expansion as criminal behaviour and the role of police at the 'frontier'.[35] This is instrumental to our understanding for both the historical and the crime. Cunneen finds a similarity of experience of Indigenous Australians with other Indigenous peoples in countries derived from common law traditions, including the US, Canada and New Zealand, with their loss of lands, culture, language and marginalization, leading to increasing over-representation in the justice system.[36]

Although the Anglo-Australian legal system purported to apply English law evenly and consistently, according to the rule of law, it is well recognised that there was no such equality before the law. Settlers were usually able to avoid punishment for crimes against Aboriginal people on the basis of provocation, self-defence or lack of reliable evidence.

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[33] Watson, I, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space*'* (2014). In *AlterNative: An International Journal of Indigenous Peoples*, Sage Publishing, Vol 10, 5.
[34] Cunneen, C, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' (2014), In Bucerius, S and Tonry, M, (eds), *The Oxford Handbook of Ethnicity, Crime and Immigration*, Oxford University Press, 386-407.
[35] Cunneen, C, 'The Criminalisation of Indigenous people' (2001). In Cunneen, C, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (2001), Allen & Unwin; Cunneen, C, 'Aboriginal deaths in custody: a continuing systematic abuse' (2006). In *Social Justice*, 33.4; Cunneen, C, and Porter, A, *Indigenous Peoples and Criminal Justice in Australia* (2017), Palgrave-Macmillan; Cunneen, C, 'Sentencing, Punishment and Indigenous People in Australia' (2018). In *Journal of Global Indigeneity,* 3,1.
[36] Cunneen, C, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' (2014), In Bucerius, S and Tonry, M, (eds), *The Oxford Handbook of Ethnicity, Crime and Immigration*, Oxford University Press, 3.

Conversely, Aboriginal people were found guilty of murder against white settlers and punished to the full extent of the law.[37]

It is now axiomatic that colonial dispossession of Aboriginal people from their land, and the subsequent loss of their language, has had a marked impact on the Indigenous culture, with great disadvantage for Indigenous people.[38] This has contributed to the high percentage of Indigenous offenders in contact with the law, as a matter of continuing history and current experience. [39]

After settler domination of the land was established, in the late 1800's and early 1900's, a policy of 'protection' was phased in to manage the remaining Indigenous population. This involved their removal onto missions and reserves, and extensive government control over all aspects of life.[40] McRae and Nettheim, in their wide-ranging text on Indigenous legal issues, observed that there was almost an apartheid-like discrimination during this era.[41]

In the following years, Australian Law as it applied to Aboriginal people was sometimes ambiguous, following the English common law system as a settled colony, but with differing views as to the law regarding Aboriginal customary laws. For example, in 1829 in the case of *R v Ballard*,[42] an Aboriginal man was accused of murdering another Aboriginal person, and the New South Wales Supreme Court advised the Attorney-General that it would be unjust to apply the English law to the killing of an Aboriginal man by members of another tribe.[43] The Chief Justice said that Ballard was not subject to the court's jurisdiction, as the practice of the court was 'never to interfere in the quarrels

[37] Ibid, 1.
[38] This was of course famously recognised by the Judges in Mabo No.2 v Qld 1992, 175 CLR1.
[39] Eades, D, *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter, 5-6; Royal Commission into Aboriginal Deaths in Custody Report, 1991.
[40] ALRC Final Report 2017, No. 133, 58.
[41] McRae, H, et al, *Indigenous Legal Issues: Commentary and Materials,* (4th ed, 2009), Thomson Reuters, 25.

[42] R v Ballard or Barrett (1829) NSWSupC 26.
[43] Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws', in ALRC Report No.31, 4. (Aboriginal Customary Laws and Anglo-Australian Law After 1788).

between the natives themselves'.[44] This suggested that Aboriginal Australians were beyond the Australian legal system.

The Murrell case (1836)[45] and Bonjon case (1841)[46] illustrated the difficulties in the relationship between the colonial courts and the Indigenous accused.[47] In the case of Jack Congo Murrell in 1840, the Full Court of the New South Wales Supreme Court held that it had jurisdiction to try one Aboriginal man for the murder of another. The defendant relied on Aboriginal customary law, as the victim, apparently, was a member of the group which had killed his brother. In that case, judicial punishment was mitigated for offences other than treason and wilful murder, because it was considered absurd to ignore native law while its practice continued.[48] Then in 1841, in the case of *R v Bonjon*, Justice Willis stated there was no express law which makes the Aboriginal people subject to our Colonial Code and the case did not proceed. Bonjon was handed over to the Protectorate to be 'educated' but later was murdered in a customary payback killing.[49] Kercher described these cases where Aboriginal people were subject to the law of England in relation to conflicts between themselves,[50] but in cases that followed, Aboriginal people were treated as subject to Australian law.[51]

The Protection era laws which followed had a marked impact on Indigenous people throughout Australia. In Victoria, the *Aborigines Protection Act 1869 (Vic*)[52] had strict regulatory power of all aspects of life for an Aboriginal person, as to where they could live, their employment, or who they could marry. Under these protectionist policies, the

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[44] Kercher, B, 'R v Ballard, R v Murrell and R v Bonjon' (1998), *Australian Indigenous Law Reporter* 410, 3, 3, 3.
[45] R v Murrell (1836), 1 Legge 72, NSWSupC 35.
[46] R v Bonjon (1841), NSWSup C 92.
[47] Kercher, B, 'R v Ballard, R v Murrell and R v Bonjon', (1998), *Australian Indigenous Law Reporter,* 3,3,410; see also Douglas, H and Finnane, M, *Indigenous Crime and Settler Law: White Sovereignty after Empire*, Palgrave and MacMillan,125-126.
[48] Ibid. See also McCrae et al, *Indigenous Legal Issues: Commentary and Materials* (4th ed 2009), Thomson Reuters, 25. 150 [3.290].
[49]Kercher, B, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998), 54, *Indigenous Law Bulletin,* 4,13,7.
[50] Kercher, B, 'R v Ballard, R v Murrell and R v Bonjon' (1998) *Australian Indigenous Law Reporter* 410, 3, 3.
[51] Auty K, Russell, L, 'Hunt them, hang them: 'The Tasmanians' in Port Philip 1841-42' (2016). *Justice Press.*
[52] *Aboriginal Protection Act 1869 (Vic).*

State government provided limited land to dispossessed Indigenous people, and a number of small reserves were established at Framingham, Coranderrk and Lake Condah. The Coranderrk reserve, where Indigenous people lived from 1863 – 1924, was the most well-known, and features in a number of historical cases and inquiries. In 1881, a parliamentary inquiry[53] was established following a well-organised campaign by Indigenous people, led by Koori leader William Barak, in response to the threat of dispossession. The campaign brought the situation of Indigenous people to public knowledge.[54] According to that Inquiry

> The history of Coranderrk provides a window into the history of colonial dispossession in settler states. It vividly illustrates the way in which settler-colonisation impacted on Indigenous people in Victoria.[55]

The Inquiry noted that 'at the heart of the conflict was land'.[56] The land, for the Kulin people, was recognised as an essential and inseparable part of their identity, spirituality and way of life.[57] Coranderrk was formally closed in 1924 and any people remaining were sent to the Lake Tyers reserve.[58] In his work on the difficulties of Aboriginal people to remain on their land under colonialism, historian Bain Attwood noted that 'Aboriginal leaders created historical narratives that remembered the past in ways that provided them with a new Indigenous identity'.[59] In this way, they drew on their own traditions and adapted others.

The legislative framework that introduced the protection era, the *Aborigines Protection* Act 1909, was followed by the *Aborigines Protection Act Amendments* in 1915 and 1918 which allowed the Board to remove children from parents for training. This led to child

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[53] Victorian Government 1881 Parliamentary Coranderrk Inquiry. See <https://trove.nla.gov.au/list?id=90626>.
[54] Ibid.
[55] Ibid.
[56] Ibid,3.
[57] Ibid,4; Many decades later, this sentiment is still borne out by the discourse of Aboriginal people in the Koori Court. When telling their stories during the 'Sentencing Conversation,' they often voiced their spiritual connection with the land as part of their identity.
[58] National Museum of Australia, 'Defining Moments, Coranderrk'. See https://www.nma.gov.au/defining-moments/resources/coranderrk.
[59] Attwood, B, *Rights for Aborigines* (2003), Allen & Unwin, xii.

removals and permanent separation from their families, and the destruction of cultural and familial bonds, as explained in detail in the 'Bringing Them Home Report', into what is now known as the 'Stolen Generations'.[60]

This government coercion through the Aboriginal Acts marked the beginning of an era of control of Aboriginal people that has resonated right through Australian history and into the criminal justice system today.[61] In this chapter, I briefly focuss on the period of 1890-1950 commonly described as the Stolen Generation, however, we cannot separate the laws and social impact of the effect these laws had on not only Aboriginal families, but on the whole emerging Australian community.[62]

McRae and Nettheim consider that during the colonisation of Australia, the apparatus of the criminal justice system was used as a key strategy to control the Indigenous people, using policing, conviction and punishment to break down their culture, remove them from their land and take away their children.[63]

From the 1890's to 1950's, Aboriginal people were segregated to "protect" them from European contact and moved onto reserves or missions. In his study on the policing of Indigenous Australians in the criminal justice system, Russell Hogg argues that 'administrative segregation' gave way to 'penal incarceration' as a mode of Indigenous regulation.[64]

From 1920 there was forced assimilation of so-called 'part Aboriginals' to reduce the number of people on reserves. Leading Indigenous scholar, Marcia Langton, also writes

[60] Human Rights and Equal Opportunity Commission, *Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (April 1997), http://www.hreoc.gov.au/social_justice/bth_report/report/index.html).
[61] McRae, H, Nettheim, et al, *Indigenous Legal Issues: Commentary and Materials,* (2009), 494-495.
[62] See Ch 6, II, p14 for an insight into the on-going effects of some of the key strategies which were used to control Indigenous people in the past, which are still resonant in the criminal justice system today.
[63] McRae, H, et al, *Indigenous Legal Issues: Commentary and Materials*, (2009), [10.10] 494.
[64] Hogg, R, 'Penality and Modes of Regulating Indigenous Peoples in Australia' (2001), In *Punishment & Society* 3 (3), 355-379. See also ALRC 2017 Report No.133.

extensively on the influence of the missions on Aboriginal societies in the early days of colonial settlement and their effects on family and cultural life.[65]

Then from the end of the nineteenth century, various state and territory laws were put in place to control relations between Aboriginal people and other Australians.[66] This era, covering most of the 20th century was still known as the Assimilation era, thus was characterised as an important breakthrough for Indigenous equality, with discriminatory laws repealed and the reserves closed down.[67] However, McRae and Nettheim observed that it was not yet well recognised that equal laws, when applied indiscriminately, may also produce discrimination of the most damaging (and hidden) kind, such as using a white rather than Indigenous criteria for equality.[68]

A significant milestone was of course the *Commonwealth of Australia Constitution Act 1901 (Cth),* which took effect on 1 January 1901.[69] This Act established the composition of the Australian Parliament, and provided the basic rules for the government of Australia.[70] This legislation which has such an important place in Australia's history, excluded Indigenous people from discussions about the creation of a new nation. Aboriginal and Torres Strait Islander people were not mentioned in the Constitution other than to be deemed necessary to make special laws, as in Section 51 (xxvi), where they were classified as the 'Other'.[71]

> *Part V, 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
> *…(xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.*[72]

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[65] Langton, M, et al (eds) *Honour Among Nations?: Treaties and Agreements with Indigenous People* (2004), Melbourne University Press.
[66] See McRae, H et al, *Indigenous Legal Issues: Commentary and Materials,* (4th ed, 2009), Thomson Reuters, (2009) [1.510-1.560]. 37-40, for information on Segregation and Assimilation laws.
[67] McRae, H, et al, *Indigenous Legal Issues: Commentary and Materials,* (4th ed, 2009), Thomson Reuters, 25, 1.540, 39.
[68] Ibid.
[69] *Commonwealth of Australia Constitution Act 1901 (Cth).*
[70] Ibid. *Part* V,51 (xxvi).
[71] Ibid.
[72] *Commonwealth of Australia Constitution Act 1901 (Cth), Part* V,51 (xxvi).

As Justice Murray Gleeson observed in his speech to Parliament

> Equality can be an elusive concept. Under the Constitution, the Parliament may make special laws concerning the people of any race which, in practice, means Indigenous people. Does the Constitution treat Indigenous people in the same way as everyone else? Hardly. The race power, by its very existence, calls into question the assumption of equality[73]

Further, in Section 127, it was noted that Aboriginal people were not to be counted in reckoning the population of the Commonwealth.[74] McRae and Nettheim expressed the concern that 'the Commonwealth Constitution offered little protection against discrimination in general, and provided little by way of Indigenous peoples' rights or acknowledgement of their status as first peoples'.[75]

It was not until 1967 that these sections 51(xxvi) and 127 were amended to enable Indigenous Australians to be included in the Constitution.[76] In his comments on the 1967 referendum, Australian historian Henry Reynolds noted several things that the referendum did not address. It did not give Aboriginal people the right to vote; it did not extend social welfare benefits; it did not provide for equal pay or wage justice; it did not in itself dismantle the state systems of protection; and it did not require the Commonwealth to assume full responsibility for Aboriginal affairs. Reynolds made the further point that nor has any successive federal government done these things.[77]

Reynolds, whose primary work focussed on the conflict between European settlers in Australia and Indigenous Peoples, considered that more was achieved in the 1920s and

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[73] Gleeson, Justice M, *Recognition in keeping with the Constitution: A Worthwhile project*, (2019), Speech to Parliament, 2019.
[74] Ibid. Part VII.127.
[75] McRae et al, (eds) *Indigenous Legal Issues: Commentary and Materials*, (4th ed, 2009), Thomas Reuters, [3.880], 188.
[76] The *Constitution Alteration (Aboriginals) 1967 (Act No 55 of 1967*). The Australian referendum of 27 May 1967 approved two amendments to the Australian Constitution relating to Indigenous Australians, namely Section 51 (xxvi), and section 127. *The Constitution Alteration (Aboriginals) 1967 (Act No 55 of 1967)* became law on 10 August 1967 following the results of the referendum.
[77] Reynolds, H, 'Aborigines and the 1967 Referendum: Thirty Years On' (1998). In Papers on Parliament No. 31.

1930s amongst reformers and humanitarians who were influenced by policies elsewhere in the Empire, than with reform for Aboriginal people.[78] By 1967, the emphasis on Aboriginal affairs had changed from separatism and segregation, to focus on assimilation and integration of minority groups.[79] The *Aboriginal Lands Act* 1970 was legislated in response to accommodate Aboriginal Victorians forcibly removed from their homeland, and a degree of self-management through the return of land and the establishment of Lake Tyers and Framlington Aboriginal Trusts followed.[80] Acts such as this demonstrated a modest attempt at legislative and material support for Aboriginal people.[81]

In their review of the historical relationship between Indigenous people with the legal system since Federation, McRae and Nettheim consider that the criminalization of Indigenous people was a key strategy in the colonization of Australia, to control, remove them from their lands and break down their culture.[82] This process, where Indigenous people are over-represented in their contact with the police, the courts and the prisons, remains one of the most significant institutional challenges in the criminal justice system and the imposition of Australian laws on Indigenous communities'.[83]

In 1975 the *Racial Discrimination Act 1975 (Cth)*[84] made a wide range of racial discrimination unlawful. The Act gives effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination to which Australia is committed.[85] Unfortunately, this has not affected change for Indigenous Australians, as racial discrimination continues to occur throughout Australia. Racial discrimination may occur in direct or indirect ways, and subtle discrimination can be just as harmful as overt discrimination.

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[78] Ibid, 3.
[79] Ibid, 4.
[80] *Aboriginal Lands Act* 1970.
[81] Attwood B and Markus, A, 'The 1967 Referendum, or When Aborigines Didn't Get the Vote' (1997), *Aboriginal Studies Press*. See also <https://indigenousrights.net.au>.
[82] McRae,H. Nettheim, G, et al, *Indigenous Legal Issues : Commentary and Materials*, (4th ed, 2009), Thomson Reuters, [10.10], 494.
[83] Ibid.
[84] *Racial Discrimination Act 1975 (Cth).*

[85] International Convention on the Elimination of All Forms of Racial Discrimination, 1996. Refer to https://www.humanrights.gov.au/our-work/race-discrimination.

More specific to Victoria, and indeed to this thesis, is the *Constitution Act 1975* (Vic), which now acknowledges that Victoria was colonised 'without proper consultation, recognition or involvement of the Aboriginal people of Victoria'.[86] It recognises that Indigenous people were 'the original custodians of the land', and have a 'unique status as Australia's first people,' with a 'spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria'.[87] This was an amendment inserted into the Constitution in 2010.[88] This acknowledgement supports the rationale of the Koori Court which recognises the challenges still faced by Indigenous people. When I listen to the stories of defendants who come to the Koori Court, the loss of identity is clearly evident in their communication.[89]

During the following years, and throughout the 1980's, there was concern about the high levels of over-representation of Aboriginal people in the prison system.[90] Calls for a national inquiry were made into the disproportionate number of Indigenous deaths in custody, with the recognition of the tragic injustices which Indigenous Australians suffered at the hands of the criminal justice system.[91] This led to the establishment of the Royal Commission into Aboriginal Deaths in Custody 1991.

III Royal Commission into Aboriginal Deaths in Custody Report 1991 (RCIADIC)[92]

The Royal Commission into Aboriginal Deaths in Custody, 1991, was the key National public Inquiry into Aboriginal treatment under the law. This pivotal Inquiry was established in 1987 by the Hawke government under their Attorney-General, following a spate of 22 Indigenous deaths in custody in six months. Then over the next three-year period, 99 deaths of Aboriginal people and Torres Strait Islanders were investigated. In

[86] The Constitution Act 1975 (Vic) s 1A(1).
[87] Ibid. s A(2),(a),(b),(c).
[88] The Constitution Act 1975 (Vic), Authorized amendment as at 1 July 2010, 8750 of 1975, Version No. 221, 1A (2) (a),(b),(c).
[89] See Chapter 7, II, 1. for a discussion on the importance of identity for an Aboriginal person and how this may have an impact on their experience in the criminal justice system.
[90]Cunneen. C, 'The Criminalisation of Indigenous People' (2001). In Cunneen, C, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (2001), Allen & Unwin, 18.
[91] McRae, H and Nettheim, G, (2009), 474.
[92] Royal Commission into Aboriginal Deaths in Custody, 1991.

1990 the terms of the Inquiry were broadened to include the importance of the history of Indigenous peoples in criminal law, and the wider effects of the colonial process. In the National Report, the principal Commissioner in the RCIADIC, Elliott Johnston, stated 'it is important that we understand the legacy of Australian history (…) the deep sense of injustice felt by Aboriginal people, their disadvantaged status today, and their current attitudes towards non-Aboriginal people and society'.[93]

The RCIACIC Report claimed that the higher number of Indigenous deaths in custody was 'totally unacceptable' and due to their 'overwhelming' over-representation in custody. Too many Aboriginal people are in custody too often. [94] The complex phenomenon defies simple explanation, with diverse factors which must be considered both historically and in the context of a criminal justice system which has not bridged the cultural gap, and remains alien to many Indigenous people.[95]

The Royal Commission put on record the full extent of the problem of the over-representation of Aboriginal people in the prison system. It became the most extensive inquiry into all aspects of Indigenous involvement with the criminal justice system, culminating in 339 recommendations to achieve the ends of reducing custody levels, remedying social disadvantage, and assuring self-determination.[96] These findings became the catalyst for a number of initiatives in Victoria to address Indigenous over-representation in criminal justice, for example the first Victorian Aboriginal Justice Agreement, signed in 2000 between the government, the courts and the Aboriginal community, which led to the development of the Koori Court program in 2002 and the establishment of Koori Courts for Indigenous offenders in areas of need throughout Victoria.

[93] RCAIDIC, 1991, Volume 2, 10, 3.
[94] RCIADIC, 1991, vol 1, [1.3.1]-[1.3.3].
[95] McRae,H, Nettheim, G, Anthony, T, Beacroft, L, Brennan, S, Davis, M, Janke, T, *Indigenous Legal Issues: Commentary and Materials,* (4th ed, 2009),Thomson Reuters,497-503.
[96] Ibid.

Commissioner Elliott Johnston's work championed justice and equality for all under the law. Regrettably, many of the recommendations that he made remain under-utilized, and the problems of deaths in custody and over-incarceration endure.[97]

The Final Report and Recommendations, published in 1991, found that whilst the rate of Aboriginal deaths in custody was no different to the rate of non-Aboriginal deaths in custody,[98] there were 15 times as many Aboriginal people in prison than non-Aboriginal people'.[99] Whilst states and territories produced many reports for implementation in response to the Final Report, the problems it highlighted have not been resolved.[100] McRae and Nettheim consider that the criminal justice system remains one of the most significant sites of colonisation in Australia. The full extent of harassment, intervention, and bias that Indigenous people had to cope with when in contact with police, courts and prisons was brought into the public debate by the Royal Commission. It was hoped that this Report would have a significant impact on the administration of criminal justice. However, regrettably, looking now in hindsight, it was not as effective as was hoped. The criticism at the time didn't find any police or prison authorities responsible for any of the 99 deaths. Nor did any prosecution ensue afterwards. While some improvements have been made following the Royal Commission findings, 'Indigenous people continue to be arrested, convicted and punished for crimes at rates which are grossly disproportionate'.[101]

At the same time, Cunneen notes that while the Royal Commission found that the high number of Aboriginal deaths in custody was directly related to the overrepresentation of Aboriginal people, the Commission found there was little understanding of the duty of

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[97] Johnston, E, et al (eds), *Indigenous Australians and the Law,* (2nd ed, 2008), Routledge-Cavendish, ix-xi; Hossein, E, Worby, G, and Tur, S, (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (2016), The Federation Press.
[98] Royal Commission into Deaths in Custody Report 1991.
[99] Johnston, E, 'The Royal Commission into Aboriginal Deaths in Custody: Looking forward, looking backwards' (2nd ed, 2008). In Johnston, E et al (eds), *Indigenous Australians and the Law*, Routledge-Cavendish, 9.
[100] Gannoni A & Bricknell, S, *Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody* (2019), Statistical Bulletin no.17, Australian Institute of Criminology; Dodson, P, '25 Years on from Royal Commission into Aboriginal Deaths in Custody Recommendations'. Address given to the National Press Club on 13 April 2016.
[101] McRae, H, Nettheim, G, et al, *Indigenous Legal Issues: Commentary and Materials* (4th ed, 2009), Thomson Reuters,473.

care owed by custodial authorities.[102] Many of the deaths in custody were avoidable, and many who died may not have needed to be in custody at all.[103]

In his 2006 article on *Aboriginal deaths in custody: a continuing systematic abuse*, Cunneen examines case studies which document the negligence and lack of training by both police and custodial officers which resulted in the deaths of Indigenous persons. According to Cunneen, the continuing Aboriginal deaths in custody since 2000 illustrate the systemic defects in custodial situations that allow them to occur in a society that has largely marginalized Indigenous peoples. He highlights failings such as medical assessments not communicated; lack of training of prison staff in how to respond to vulnerable persons such as the mentally ill; or a failure of staff in following instructions or procedures.[104]

In examining factors which bring Indigenous people into contact with the law, Cunneen turns his attention to the high number of deaths in custody in which the Aboriginality of the person was a significant factor.

> Despite the Royal Commission, Indigenous people remain dramatically overrepresented in the criminal justice system. Deaths in custody still occur at unacceptably high levels and the recommendations of the Royal Commission are often ignored. Rather than a reform of the criminal justice system, we have seen the development of more punitive approaches to law and order, giving rise to expanding reliance on penal sanctions.[105]

Cunneen considers that the more punitive approach to law and order in the criminal justice system, means that there is an inability by custodial authorities to effectively generate a greater sense of obligation and responsibility towards those who are incarcerated.[106]

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[102] Cunneen, C 'Indigenous Incarceration: The Violence of Colonial Law and Justice', (2011). In Scraton, P, and McCulloch, J, (eds), *The Violence of Incarceration*, Routledge Taylor and Francis, 209-224.
[103] McRae, H, Nettheim, G, et al, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2009), Lawbook Co., 497.
[104] Cunneen, C, 'Aboriginal deaths in custody: a continuing systematic abuse' (2006). In *Social Justice*, 33.4 (Winter 2006), 37+.
[105] Ibid.
[106] Ibid.

The problems of over-incarceration have endured, illustrated by the continuing deaths of Aboriginal people in custody.[107] Over-incarceration and deaths in custody still occur as a result of institutional racism in the criminal justice system and Australian society more generally. Since the recommendations of the Royal Commission, there has been an increase in 'law and order' responses to crime as a response to a number of serious offences in Victoria. This has resulted in the passing of Victorian legislation for the abolition of suspended sentences and changes to bail laws, with plans to introduce mandatory sentencing.[108] In addition, there has been an increased police presence and the building of new prisons to house the expanding prison populations, but regrettably this has not reduced the number of people in the justice system.[109]

Cunneen advocates that Indigenous demands for greater recognition of Aboriginal law and greater control over criminal justice decision-making must be taken seriously.[110] The key point he makes is that 'law and order' politics are likely to further entrench the over-representation of Indigenous peoples within the western criminal justice systems'.[111] Cunneen proposes that one of the benefits of these Indigenous courts is that the local Indigenous community becomes more actively involved in the sentencing process, whereas in the past they have been excluded in the court process.[112] This opens up cultural influences and ideas which may have not been previously considered by the legal professionals in the courtroom.

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[107] Gannoni A, and Bricknell, S, 'Indigenous Deaths in Custody: 25 years since the RCIADC' (2019), *Australian Institute of Criminology.*

[108] *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters),* Act 2013 (No.32 of 2013) enacted as part of the Victorian Government's 'tough on crime' policy.

[109] The Koori Court provides an alternative response to the continued incarceration of Aboriginal people. (see Ch 6, p1).

[110] Cunneen, C, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' (2014). In Bucerius, S and Tonry, M, (eds) *The Oxford Handbook of Ethnicity, Crime and Immigration*, Oxford University Press, 386-407.

[111] Ibid. Cunneen explains that 'while equality and equal protection of the law are seen as defining features of the rule of law, yet it is clear there has been a substantial gap in universality and equality before the law when it comes to Indigenous people'.

[112] Cunneen C, 'Understanding Restorative Justice Through the lens of Critical Criminology'(2008). In Cunneen, C and Anthony, T, (eds), *Critical Criminology Companion*, Hawkins Press, 300.

Cunneen defines alternative approaches to crime such as welfare approaches (rehabilitation, resocialisation and remedial treatment), and restorative approaches (reconciliation, reparation and reintegration), and compares these with the more punitive approach of prison.[113] His work relates to my findings that the local Elders bring Indigenous knowledge of the Indigenous culture and speaking style to the court hearing, and the Koori defendant is more likely to engage in the court process when seated before the Elders of their community.

At the same time as the plethora of legal analysis and discussion arose with the findings of the Royal Commission, sociolinguist Diana Eades undertook a number of seminal studies reviewing in depth court cases where Indigenous offenders had been disadvantaged because of their Aboriginal identity or 'Aboriginality'.[114] As mentioned in Chapter 6, her body of work was one of the first to take a sociolinguistic and legal view of the problems of miscommunication between Aboriginal speakers and legal practitioners in the legal domain, and this thesis has drawn on her seminal research and analysis of communication in the justice system. Eades' work is explained in more detail in Chapter 4.

We now turn to an overview of the 1990s and 2000s in the context of the Australian Human Rights Commission Aboriginal and Torres Strait Islander Social Justice Commissioners' work which is relevant to this thesis.

IV Aboriginal and Torres Strait Islander Social Justice Commissioners (1990-2000s)

In 1992, the year following recommendations made by the Royal Commission into Aboriginal Deaths in Custody 1991, Prime Minister Keating delivered the Redfern

[113] Cunneen, C, and White, R, *Juvenile Justice: Youth and Crime in Australia* (3rd ed, 2007), Oxford University Press, 340.
[114] Eades, D, 'A case of communicative clash: Aboriginal English and the legal system (1994). In Gibbons, J, (ed), *Language and the Law*, Longman Group, Harlow, 234-264; Eades, D, 'Language and Disadvantage before the Law' (2008), In J. Gibbons and M Teresa Turell, *Dimensions of Forensic Linguistics*, John Benjamins, Amsterdam.

Speech.[115] This was an explicit recognition of past injustices to Aboriginal people and the challenges faced by all Indigenous peoples. While acknowledging that it was 'we who did the dispossessing', the Prime Minister also noted the depth and diversity of Aboriginal and Torres Strait Islander cultures, and the remarkable contributions Aboriginal people have made when they have been included in the life of Australia.[116]

Accordingly, 1993 saw the creation of the first position of Aboriginal and Torres Strait Islander Social Justice Commissioner within the Human Rights and Equal Opportunity Commission (HREOC) by the Keating Government.[117] Each year, the Aboriginal and Torres Strait Islander Social Justice Commissioner submits a report to the Attorney General on what has been achieved in addressing social justice for Indigenous people. This of course includes progress in issues regarding the administration of criminal justice. These reports represent a valuable body of work regarding Aboriginal and Torres Strait Islander Peoples and their relationship with the institutions of government and society. I will overview four different periods of the work of the ATSI Social Justice Commission during the years 1993-2017, which address 'the needs of Aboriginal and Torres Strait Islander people to exercise the basic human rights that the rest of the nation take for granted'.[118]

Aboriginal barrister, scholar and political and activist, Professor Mick Dodson, became Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner in 1993, serving until 1998.[119] In his five annual reports, Dodson prepared a formidable critique of Australia's human rights record with regard to its Indigenous peoples. Dodson's reports on the Stolen Generations, *Bringing them Home,*[120] deaths in custody, and reconciliation considered that if successive governments fail to learn from the past, there

[115] McRae, H, and Nettheim, G, et al, *Indigenous Legal Issues: Commentary and Materials* (4th ed, 2009), Thomson Reuters. 'Redfern Address,' (1992). Speech delivered by Prime Minister Paul Keating, at Redfern, New South Wales, 296 [6.290].
[116] Ibid.
[117] Human Rights and Equal Opportunity Commission.
[118] Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner Report 2012, 18.
[119]Wansbrough, A, "Book Review – Aboriginal and Torres Strait Islander Social Justice Commissioner, Fifth Report 1997" (1998) 4 (9) *Indigenous Law Bulletin* 21.
[120] Human Rights and Equal Opportunity Commission, '*Bringing Them Home Report'* (April 1997). Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia.

were no excuses for 'the abuse of rights of Aboriginal and Torres Strait Islanders which continue in Australia today.'[121] Twenty years later, he continues to urge the government to reconsider the shameful absence of an Indigenous voice in parliament.[122]

Successive ATSI Social Justice Commission reports saw an increased awareness of the general public in the need to 'close the gap' for Aboriginal people.[123] This term in fact became the name of an Indigenous health advocacy campaign.[124] Notably the Federal Government's closing the gap agenda which sets out health and education targets, does not include the lowering of incarceration rates.[125] However, in spite of this increased awareness of campaigns such as these, disadvantage for Koories continued, in areas such as lack of housing, poor health indicators and lack of education, with a continued high percentage of Indigenous offenders returning to the criminal justice system.[126]

Human Rights and Health Advocate and community leader, Dr Tom Calma,[127] held the position of Aboriginal and Torres Strait Islander Justice Commissioner from 2004 -2008 and spearheaded many government and Indigenous community initiatives. As Co-Chair of Reconciliation Australia[128], Dr Calma was involved in Close the Gap for Indigenous Health Equality[129] and the National Congress of Australia's First People.[130] He brought together Indigenous and non-Indigenous health bodies to lobby the government to

[121] Ibid.
[122] Murphy, K, 'Mick Dodson urges PM to reconsider 'shameful' rejection of voice to parliament' (2018). Article in *The Guardian*, 1-3. <https://www.theguardian.com/australia-news/2018/jul/04>.
[123] Victorian Government Aboriginal Affairs Report, 2019.
[124] The Federal Government's 'Closing the Gap' agenda does not include the lowering of incarceration rates.
[125] Castan Centre Human Rights Report (2016), 'Human Rights Now', 9, Castan Centre for Human Rights Law, Monash University, Melbourne.
[126] Ibid.
[127] Calma. T, 'From Rhetoric to Reconciliation: Addressing the Challenge of Equality for Aboriginal and Torres Strait Islander Peoples in Criminal Justice Processes' (2016), In Hossein, E et al, (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston,* 133 – 147.
[128] Reconciliation Australia, established in 2001 to build relationships, respect and trust between the Australian community and Aboriginal and Torres Strait Islanders. At https://www.reconciliation.org.au.
[129]Calma, T, 'Taking stock of a decade of hope and the challenges ahead'. In Closing the Gap Progress and Priorities Report (2016),3.
[130] Calma, T - National Congress of Australia's First People. At https://www.humanrights.gov.au/.../projects/national-congress-australias-first-peoples.

develop programs for improving health outcomes for Aboriginal and Torres Strait Islander people.[131]

Calma also focussed on the over-representation of Indigenous people in the justice system, and considers issues of Indigenous disadvantage a contributing factor to this overrepresentation.[132] He describes himself as a realist, and considers that the recommendations of the Royal Commission into Aboriginal Death in Custody to reduce Indigenous over-representation at every stage of the criminal justice system have not been met.[133] He reiterated the challenge of equality for Aboriginal and Torres Strait Islander Peoples in criminal justice processes.[134] He also articulated greater access to accessible housing, education for Indigenous youth, recognition of Indigenous culture, and increased programs to improve the life of Aboriginal people.[135]

In his 2005 Social Justice Report, Calma urged Australian governments to commit to achieving equality for Aboriginal and Torres Strait Islander peoples in health and life expectancy within 25 years.[136] Calma's final report in 2009 focussed on Justice Reinvestment, where government money spent on imprisonment is redirected into local communities where there is a high concentration of offenders.[137] He identified this as part of a solution to overrepresentation. This model has been successfully introduced in a number of countries, with a successful model established in Australia in Bourke, New South Wales.[138]

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[131] Calma, T, 'Taking stock of a decade of hope and the challenges ahead'. In Closing the Gap Progress and Priorities Report (2016),3.
[132] Australian Human Rights Commission 2009 Social Justice report by Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr. Tom Calma, 9-56.
[133] Ibid.
[134] Calma, T, 'From Rhetoric to Reconciliation: Addressing the Challenge of Equality for Aboriginal and Torres Strait Islander Peoples in Criminal Justice Processes' (2006). In Hossein, E, et al (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston, (*2016), The Federation Press, 133-147.
[135] Calma, T, 'Be Inspired: Indigenous Education Reform' (2008). Speech delivered to the Victorian Association of State Secondary Principals, Melbourne, 18 August 2008.
[136] Australian Human Rights Commission 2009 Social Justice Report by Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr. Tom Calma, 2005.
[137] Australian Human Rights Commission 2009 Social Justice Report by Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr. Tom Calma, 2009.
[138] The notion of Justice Reinvestment as an answer to the high imprisonment rates of Indigenous people is reviewed again in depth in the Aboriginal and Torres Strait Islander Social Justice Report, 2015.

Two years later, on 13 February 2008, the momentous 'Apology to the Indigenous Peoples of Australia by the Australian Parliament' was given by Prime Minister Rudd to the House of Representative in the Parliament of Australia.[139] In his speech, the Prime Minister proposed that the Apology be accepted in the spirit of reconciliation in which it was offered so that there be a new beginning for Australia. The proposal was aimed at righting past wrongs and building a bridge between Indigenous and non-Indigenous Australians, based on real respect rather than thinly veiled contempt. If meeting this challenge were successful, then he proposed that it work on the further task of constitutional recognition of the first Australians.[140] Many Indigenous people said that finally their voices were heard and there was an acknowledgement and an accountability by the government for the terrible disadvantages that had occurred for Indigenous people.[141]

Despite the Apology, the issues endure. When I listen to the stories of the people in the court and during interviews, most Indigenous people stressed that either they were part of the stolen generation, or someone else in their family had been affected by forced separating families. I observed this was an intergenerational trauma for all Indigenous families caused by colonial dispossession and policies which still resonates today. [142]

Following Calma, Professor Mick Gooda served as the Commissioner from 2009 – 2016.[143] Gooda was an advocate for Indigenous health and social equality and has contributed to the understanding and inclusion of Indigenous people in all aspects of social justice in

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[139] McRae, H. et al, *Indigenous Legal Issues: Commentary and Materials* (4th ed, 2009), Thomson Reuters, [1.940], 61.
[140] National Apology to the Stolen Generations which came about following recommendations from the National Inquiry into the Separation of Aboriginal Children from their Families. See <https://aiatsis.gov.au/explore/articles/apology-australias-indigenous-peoples>.
[141] This speech, known as 'Sorry Day', was given to a packed parliament, with many Aboriginal people on the lawns outside. It was an emotionally charged speech, and for the first time, Aboriginal Australians said that they felt they were now part of the conversation. <https://aiatsis.gov.au/explore/articles/apology-australias-indigenous-peoples>.
[142] In spite of the 'Apology to the Stolen Generations', in which the government acknowledged the terrible disadvantage that had occurred for Indigenous people, the stories of Aboriginal people in the courts and in interview, reveal that the trauma of colonial dispossession and its policies is still evident (see Ch 7, p10).
[143] Australian Human Rights Commission Social Justice and Native Title Report 2015, Aboriginal and Torres Strait Islander Social Justice Commissioner, Prof. Mick Gooda.

Australia. When commenting in his 2014 'Overcoming Indigenous Disadvantage Productivity Commission' report, Gooda said that it was encouraging that the previous investment over a number of years to improve Indigenous health and education outcomes had been effective.[144] However, Peter Harris, chairman of the Steering Committee for the Productivity Commission's Review of Government Service Provision, warned 'justice outcomes continued to deteriorate, with adult imprisonment rates worsening from already high rates', and 'results in areas such as justice and mental health continued to cause concern'.[145] These conflicting comments show the difficulty in achieving successful outcomes in this sector.

Both in the Social Justice Commissioner's role and beyond, Gooda advocated for the rights of Aboriginal and Torres Strait Islander peoples in Australia and sought to promote respect and understanding of these rights among the broader Australian community.[146] He considered that closing the health gap between Indigenous and non-Indigenous Australians was 'non-negotiable'.[147] Gooda was also appointed to the Referendum Council on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples in 2015, and has always actively maintained that Aboriginal people be involved in decisions that affect them.[148] He considers that the over-representation of Indigenous Australians in the criminal justice system is one of the most human rights issues facing Australia and laments that 'it is shameful that we do better at keeping Aboriginal people in prison than in school or university'.[149] Gooda more recently sat on the Don Dale Royal Commission in

[144] Overcoming Indigenous Disadvantage Productivity Commission's Report (2014). At http://abc.net.au/news/2014-11-19/productivity-comm-report-finds-indigenous.
[145] www.humanrights.gov.au/our-work-aboriginal-and-torres-strait-islander-social-justice-commissioner-2010-2016>.
[146] www.humanrights.gov.au/our-work-aboriginal-and-torres-strait-islander-social-justice-commissioner-2010-2016>.
[147] Ibid.
[148] Gooda, M, in a speech on 7 December, 2015, on his appointment to the Referendum Council, argued the case for recognition with the words 'it is about us all as Australians having a say in the kind of country we want to live in'. 'By recognising Aboriginal and Torres Strait Islander Peoples and removing discrimination, we are sending a powerful message about the way we wish to see ourselves as a nation as Australians'. At www.humanrights.gov.au/about/news/commissioner-gooda-appointed-referendum-council.
[149] www.humanrights.gov.au/commissioners/mick-gooda-aboriginal-and-torres-strait-islander-social-justice-commissioner.

the Northern Territory, which concluded in 2017 that there were continuing failures in the management of youth in the justice system in the Northern Territory.[150]

In 2017, June Oscar became the new Australian and Torres Islander Social Justice Commissioner, and joined former Commissioners Gooda and Calma in calling for a referendum on constitutional recognition within five years.[151] She told the Joint-Select Committee that it was time to move beyond discussions and begin negotiations between the Australian Parliament and Indigenous Australians, to present a pathway forward for delivering social justice for Indigenous Australians.[152]

In a powerful speech at the Aboriginal Child & Family Biennale Conference on 20 November 2019, Commissioner June Oscar asked government at all levels in Australia to 'flip the system from crisis to prevention investment'.[153] She stressed that

> to effectively respond to the systemic issues, we have to break the cycle of inequality and interventions. (…) For this to happen, we have to know the lives, the stories and histories that sit behind the statistics. This data (…) has to be told through our words and our experiences, our strengths and resilience, and our hope, commitment and determination for a different future[154]

Consistent in all these Social Justice Commissioners' reports is the continuing inadequacy in the Australian justice system to deal with Aboriginal people and the difficulties Aboriginal people have with the system.

[150] Royal Commission into the Protection & Detention of Children in the Northern Territory, Final Report 17 November 2017.
[151] Social Justice Commissioner June Oscar speech to the Joint-Select Committee in 2018. At <https://pmc.gov.au/indigenous-affairs/constitutional-recognition>.
[152] Ibid.
[153] Australian Human Rights Commission. Speech by Aboriginal and Torrens Strait Islander Social Justice Commissioner, June Oscar to the Aboriginal Child & Family Biennale Conference, on Wednesday 20 November 2019. (for further information, see <https://www.absec.org.au>conference>).
[154] Closing the Gap Report 2020. At <http:ctgreport.niaa.gov.au>.

A notable milestone in Australian Indigenous reconciliation occurred in May 2017, when Aboriginal and Torres Strait Islander First Nations Peoples came from all over Australia to meet at Uluru, Central Australia for the historic National Constitutional Convention, to discuss constitutional change and structural reform to improve the lives of future generations.[155] All stressed their spiritual ties to the land and a desire that their ancient sovereignty take its rightful place as a fuller expression of Australia's nationhood. However, there was an expression of powerlessness in their voices for their people over the past two hundred years

> We are the most incarcerated people on the planet
>
> We are not an innately criminal people
>
> And our youths languish in detention in obscene numbers
>
> They should be our hope for the future[156]

Following this meeting, the '*Uluru Statement from the Heart*'[157] was delivered to the Prime Minister of Australia with a plea to work towards an agreement between government and First Nations people for constitutional reform. There was considerable emotional investment in this landmark statement, which sought the establishment of a First Nations Voice enshrined in the Constitution.[158] However, this plea was rejected by the then Prime Minister, Malcolm Turnbull and his successor Scott Morrison.

During the same period, the Victorian State Parliament implemented plans for a State Treaty to acknowledge Aboriginal and Torres Strait islander people as Sovereign

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[155] The National Constitutional Convention was held in May 2017 at Uluru in Central Australia, bringing together over 250 Aboriginal and Torres Strait Islander leaders to call for the establishment of a 'First Nations Voice' in the *Australian Constitution.* For further information, see https://referendumcouncil.org.au for 'Uluru Statement from the Heart'.

[156] *Uluru Statement from the Heart*. At <www.ulurustatement.org>.

[157] Sean, S, 'Indigenous recognition: Turnbull Government's rejection of Uluru Statement from the Heart indefensible', *ABC News*, updated 27 Oct, 2017. At https://www.abc.net.au/news/2017-10-27/decision-to-reject.

[158] Ibid. Following the Uluru Statement from the Heart, which sought a 'voice' for Indigenous people, Chapter 6 draws on some of the experiences of Koori offenders observed in the Koori Court, where they are given a voice to tell their story, to people who will listen (See Ch 6, II, p29-33).

People.[159] On-going negotiations for the Treaty. together with the agreement of Aboriginal and Torres Strait Islander peoples reached at Uluru in the *Uluru Statement from the Heart,* are a demonstration of the Indigenous call for self-determination in all areas of government policy and law, including criminal justice.[160] As mentioned earlier in the chapter, the work of the Koori Court relates to the need for Indigenous self-determination, particularly in decisions that affect the over-representation of Indigenous Australians in the criminal justice system.

Apart from the work of the Aboriginal and Torres Strait Islander Social Justice Commissioners as detailed in this section, many Indigenous and non-Indigenous legal scholars have also been involved in the social justice issues affecting Indigenous Australians. I will mention only two in this section. Firstly, is leading scholar Indigenous lawyer Larissa Behrendt, whose work focuses on Indigenous rights and achieving social justice for Aboriginal Australians.[161] Behrendt argues that

> Australian institutions do not always reflect Indigenous cultural values. Indigenous people are therefore exposed to different canons and live between two different cultures – the dominant and the Indigenous – and so have more contexts in which to explore options and ways of understanding.[162]

Behrendt speaks with authority of many of the important Indigenous milestones that have occurred over the period of her lifetime. As an Aboriginal woman, she brings a personal reflection of Indigenous recognition, beginning with changes to the Constitution in 1967 which recognised Indigenous people in the Census and amended the races power. She graduated from law school at the time of the historic judgment in the Mabo

[159] The Treaty Process in Victoria is an on-going policy of the Victorian Government with the aim of promoting the concept of a Treaty to non-Indigenous Australians. At https://antarvictoria.org.au/treaty-process.
[160] *Treaty for Victoria*, at https://treatyforvictoria.org.au; and *Uluru Statement from the Heart,* at www.ulurustatement.org.
[161] Behrendt, L, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003), The Federation Press.
[162] Ibid, 122-123.

case in Queensland, which ruled that Islanders held native title rights over their land and that the doctrine of *terra nullius* was false.[163]

Behrendt provides a perspective of the challenges to be faced in ensuring the compatibility of the legal system, and particularly criminal law.[164] She notes that when changes were made to the Constitution in 1967, it was intended to bring an era of non-discrimination for Indigenous people. However, this expectation was misplaced. Since that time, unintended consequences have been that key areas of Indigenous policy such as housing, health, education and employment have become shared responsibilities between both federal, states and territories. Rather than being a cooperative relationship, there was now a shift of blame and responsibility between both levels of government.[165]

In her chapter honouring Elliott Johnston,[166] Behrendt notes that although changes to the Constitution recognised Indigenous people, legal advancements for Aboriginal recognition was much slower. As an advocate for Indigenous self-determination, Behrendt believes Indigenous people do not want to be caught up in a welfare mentality, but to actively determine their own future.[167] She rejects the notion that assimilation is the answer. This assumes that there is a level playing field. The socio-economic statistics and historical legacies of colonisation continue the disadvantage experienced by Indigenous people.[168]

The key piece relevant to this thesis is that Behrendt's work focuses on what Indigenous people actually articulate regarding self-determination and achieving social justice. This supports my research on the importance of listening to the voices of Koori people who come into the court system. In the Koori Court, Koori defendants are able to have a voice

[163] Mabo v Queensland (No.2) 175 CLR1 at 32-33.
[164] Behrendt, L, Cunneen, C, Libesman, T, and Watson, N, *Aboriginal and Torres Strait Islander Legal Relations,* (2nd ed 2019), Oxford University Press.
[165] Ibid, 300-301.
[166] Behrendt, L 'Power from the People: A Community-based Approach to Indigenous Self-determination' (2016). In *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston*, The Federation Press, 87-103.
[167] Ibid, 91-94.
[168] Ibid.

in the justice system. In this court they can tell their story to people who will listen and offer support, prior to the judicial officer deciding on an appropriate sentence.

Professor Marcia Langton is another leading Indigenous scholar, anthropologist and activist who has championed Indigenous empowerment, self-determination, and the reform of the native title process. Langton examines the influence of the missions on Aboriginal societies in the early days of colonial settlement, and her work over 30 years shows her formidable grasp of Aboriginal history. In her collection of important contributions on Indigenous peoples' rights, treaties and agreement making, *Honour Among Nations,*[169] Langton brings together attempts to address past injustices experienced by Indigenous peoples and to monitor the continuing relationship of Indigenous people with International and comparative laws.[170] She discusses the adjustment (or lack) of Aboriginal people to western ways, and the consequence was marginalisation and disadvantage for Aboriginal communities.[171]

In her contribution to the collection honouring Elliott Johnston, Langton argues against mandatory sentencing[172] and says that this is an electoral strategy, not a criminal justice policy, and policies such as this have brought the high standards of the judicial system into disrepute. Apart from the high cost of the increased number of people in the prison system, often for minor offences, in her view, the explosion of the prison population is a political reaction with no evidence that imprisonment rehabilitates offenders or reduces crime rates. [173]

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[169] Langton, M, et al, (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (2004), Melbourne University Press.
[170] Ibid, 3.
[171]. Langton, M, 'Anthropology, Politics and the Changing World of Aboriginal Australians', (2011), In *A Journal of Social Anthropology and Comparative Sociology*, 21, at https://doi-org.ezproxy.lib.monash.edu.au/10.1080/00664677.2011.549447.
[172] Mandatory sentencing was first introduced into Australian courts in 1997 to Northern Territory and Western Australia, and since that time is now a sentencing option in all states. Mandatory sentencing in Victoria as a response to a changed public and government attitude to crime is discussed in Chapter 3 of this thesis. At https://www.sentencingcouncil.vic.gov.au.
[173] Langton, M, 'A Tragedy of Dumb Politics: Does Mandatory Sentencing Cause Fundamental Damage to the Legal System?' (2000). In Hossein, E, Worby, G, and Tur, S, (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (2016), The Federation Press, 62-75.

I now turn to the Australian Law Reform Commission Final Report 2017, published some 25 years after the Royal Commission into Aboriginal Deaths in Custody, which explores certain key recommendations that are relevant to this research.

V Australian Law Reform Commission Inquiry into Aboriginal Incarceration[174]

In 2016, the ALRC conducted a wide-ranging inquiry into over-incarceration rates, culminating in 2017. Its Final Report No. 133, released in December 2017, entitled '*Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'*, is an important analysis of the continuing over-representation of Aboriginal Australians in the criminal justice system. This Inquiry, headed by Commissioner Judge Matthew Myers, built on the work of the Royal Commission into Aboriginal Deaths in Custody and many subsequent reports, to provide a new comprehensive review of the past nearly three decades of the implementation of the Report's recommendations.[175]

The impotarus of the Inquiry was to inquire into the continuing over-representation of Aboriginal and Torres Strait islander people in prison and develop recommendations for reform of laws and legal frameworks to reduce their disproportionate incarceration.[176] The incarceration rate of Aboriginal and Torres Strait Islander offenders compared with non-Indigenous offenders are discussed further in Chapter 3 of this thesis. However, this report noted 'over-representation is both a persistent and growing problem', and the gap has increased 41% between 2006 and 2016.[177]

The scope of reference was to review the laws and legal frameworks that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples, and to consider

[174] ALRC Final Report 2017. No. 133.
[175] Ibid. The importance of the ALRC Inquiry is that it reviewed the key RCIADIC recommendations and found that Indigenous over-representation in the criminal justice system is still a 'persistent and growing problem'. The final ALRC Report draws together many of the issues of concern regarding Indigenous peoples struggle for justice. For more on this review, see Ch 3, V p20-22.
[176] Ibid, 23.
[177] Ibid, 21.

the availability of alternatives to incarceration, with regard to community safety.[178] The Inquiry required access to a broad range of existing data and research on all best practice laws, pathways of Aboriginal peoples through the system and many other reports, inquiries and action plans.[179] The completion of this Report and subsequent recommendations have provided a comprehensive document which draws together many of the issues of concern regarding some of the difficulties which continue to be experienced by Indigenous people in their struggle for access to justice.

The key recommendations cover a wide range of very important factors. Two recommendations are particularly relevant to this thesis.[180]

> 6-1 Sentencing and Aboriginality.
> Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[181]
>
> 6-3 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.[182]
>
> 10-2 Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.[183]

[178] ALRC, Final Report 2017, No. 133, Terms of Reference, 5-7.
[179] Ibid.
[180] ALRC Final Report 2017, No. 133. Key Recommendations, 14,16.
[181] Ibid, 14. At https://alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/6-sentencing-and-aboriginality/sentencing-aboriginal-and-torres-strait-islander-offenders/.
[182] Ibid.
[183] Ibid, 16. At https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/10-access-to-justice/specialist-aboriginal-and-torres-strait-islander-sentencing-courts/.

> 10-3 Relevant Aboriginal Torres Strait Islander organisations should play a central role in the design, implementation and evaluation of specialist Aboriginal and Torres Strait Islander sentencing courts.[184]

These recommendations take a 'justice reinvestment' approach to criminal justice, directing resources away from strategies such as the building of more prisons, and redirecting government funds into local Indigenous communities which can address the causes of offending.[185] There are of course numerous additional recommendations that address the general issue of over-incarceration and the engagement of Indigenous people in the criminal justice system.[186] It is noted that their implementation, such as more diversion, support and rehabilitation programs both before and after incarceration, come with a cost.[187] However, the Commission considered that there was a compelling case for Australian governments to match this proposed cost against the cost of ongoing incarceration of Aboriginal people at disproportionate levels.[188]

The ALRC Report noted that sentencing decisions are crucial in determining whether a person goes to prison and for what period.[189] When considering the many cases which have had an impact on Indigenous justice in relation to the Koori Court, I note two in particular which are significant to this thesis. These are the High Court judgment of Bugmy v The Queen in 2013;[190] and the Victorian Supreme Court 2018 decision in the case of Cemino v Cannan and Ors.[191]

In 2013, the High Court of Australia explicitly recognised Indigenous disadvantage in the case of *Bugmy v The Queen.*[192] This successful High Court challenge allowed Aboriginal man William Bugmy to appeal a decision to re-sentence him to five years' imprisonment without parole. The High Court reasoned that a person's Aboriginal background may

[184] Ibid.
[185] Ibid, 25.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] *Bugmy v The Queen* (2013) HCA 37 2 October 2013.
[191] *Cemino v Cannan and Ors* (2018) VSC 535.
[192] *Bugmy v The Queen* (2013) HCA 37 2 October 2013.

reduce their sentence if they come from a deprived or disadvantaged background, as the effects of profound disadvantage do not diminish over time.[193] This decision remains relevant, as it may explicitly or implicitly impact future sentencing of Aboriginal offenders in the conventional court system.[194] In the Koori Court, of course, consideration is already given to underlying factors of Indigenous disadvantage.

The case of *Cemino v Cannan and Ors* is an example of the right of an Aboriginal defendant to have his case heard in the Indigenous Koori Court in a regional town rather than the mainstream Magistrates' Court in the location of the offence.[195] The defendant, a member of the Yorta Yorta people, had applied to the Magistrates' Court in Echuca to have his case heard before his Elders in the Koori Court in Shepparton, where he would feel more comfortable discussing circumstances, such as the passing of his mother, a Yorta Yorta woman. The Koori Court does not sit in Echuca. The Magistrates' Court in Echuca refused the application on the basis of the 'proper venue' principle.[196] The Magistrates' decision was appealed, and the Victorian Equal Opportunity and Human Rights Commission intervened.[197] Justice Ginnane of the Supreme Court found that the Magistrate had overlooked aspects of the legislation that clearly permitted the transfer of certain matters to other locations in order for Aboriginal persons to access the Koori Court.[198]

Justice Ginnane found that the Magistrate in Echuca acted unlawfully by refusing a young Aboriginal man's request to be sentenced before the Koori Court sitting at Shepparton.[199]

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[193] Ibid.
[194] Anthony, T, 'Indigenising Sentencing? Bugmy v the Queen' (2014). In *Sydney Law Review*, 35, 2, 451-466.
[195] *Cemino v Cannan and Ors* (2018) VSC 535.
[196] The proper venue' principle is discussed in a 1994 Supreme Court decision of Rossi v Martland (1994) 75 A Crim R 411.
[197] Victorian Equal Opportunity & Human Rights Commission, *Cemino v Cannan and Ors* [2018] VSC 535,1.

[198] Ibid, 2.
[199] The Victorian Supreme Court has confirmed that courts must consider the distinct cultural rights of Aboriginal people under Victoria's Charter of Human Rights and Responsibilities (the Charter) when making decisions in relation to an Aboriginal person's request to be heard in the Koori Court.

The significance of the finding is that courts must consider the distinct cultural rights of Aboriginal people under the Charter when making decisions in relation to an Aboriginal person's request to be heard in the Koori Court.[200]

The above cases of *Bugmy* and *Cemino* demonstrate ways that higher level courts have responded to the special situations of Aboriginal accused. The ALRC further notes that 'sentencing courts in all jurisdictions now have the ability to take account of an offender's background of disadvantage'.[201]

In line with an increasing awareness of the role of the courts, the ALRC recognised that sentencing courts have the capacity to take into account the offender's background of disadvantage. These cases speak to Aboriginal identity as a special characteristic as noted explicitly by the ALRC.[202] The 2017 ALRC Report, reported that up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence, often for otherwise low-level offending.[203] A large proportion of these people do not receive a custodial sentence upon conviction.[204]

Another observation made was that solutions for reducing incarceration should be developed and led by Aboriginal and Torres Strait Islander people.[205] The Koori Court of Victoria was specifically mentioned as a good example where groups of Elders support and assist Aboriginal and Torres Strait Islander people throughout the criminal justice process.[206]

In closing this chapter, there are two further legal scholars I draw upon. Both have published widely on criminal justice, Indigenous legal issues and the laws of colonisation,

[200] Shmerling, T, 'Accessing the Koori Court is a Human Right'(2019). In *Right Now – Human Rights in Australia,* 2. http://rightnow.org.au/opinion-3/accessing-koori-court-human-right.
[201] Ibid,189.
[202] ALRC Final Report 2017, No. 133.
[203] ALRC Final Report 2017, No. 133, 26.
[204] Ibid, 27.
[205] Ibid, 24.
[206] Ibid.

criminologist Professor Chris Cunneen and Professor Thalia Anthony of the Jumbunna Centre, University Technology Sydney.

Cunneen's work has been highlighted earlier, and I note it more fully in Chapter 3. In his 2018 article on *Sentencing, Punishment and Indigenous People in Australia*, Cunneen critically analyses the way non-Indigenous courts have narrated the sentencing of Indigenous people.[207] He argues that sentencing in Australian courts have failed to have any impact on the increasing rates of Indigenous people.

> The way Indigeneity is considered by the mainstream courts remains captured within individualised conceptualisations predicated on various deficit discourses associated with being Indigenous, and operate to reinforce the centrality and legitimacy of the non-Indigenous legal system.[208]

According to Cunneen, the limited response of the courts to Indigenous values and laws is compounded by the lack of non-custodial sentencing alternatives, programs and services.[209] He agrees that although there has been a growth in Indigenous sentencing courts throughout Australia, comparatively few Indigenous people actually are appearing before the specialist sentencing courts. Due to this small number, he considers it could be argued that Aboriginal courts are irrelevant to what happens to the majority of Indigenous offenders passing through the mainstream justice system, continuing the over-representation of Indigenous people in the prison system.[210]

Professor Anthony writes on Indigenous criminalisation and Indigenous justice mechanisms, and examines the way the judiciary in Australia have interpreted Indigenous difference in criminal sentencing courts.[211] The central focus of Anthony's research on Indigenous people, is how the judicial recognition of Indigeneity has been as much a burden as a benefit for Indigenous people. Across a range of circumstances, she considers

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[207] Cunneen, C, 'Sentencing, Punishment and Indigenous People in Australia' (2018). In *Journal of Global Indigeneity*, 3 (1),1.
[208] Ibid, 8.
[209] Ibid.
[210] Ibid, 14.
[211] Anthony, T, *Indigenous People, Crime and Punishment*, 2013, Routledge. See also Blagg, H & Anthony, T, *Decolonising criminology: imagining justice in a postcolonial world* (2019), Palgrave Macmillan.

the judiciary has shifted in its perception of Indigeneity. Whereas Indigenous culture, custom, disadvantage and political resistance were once reference points for lessening a sentence, these are now cited to increase a sentence.[212]

Anthony suggests that

> the emphasis on deterrence, the seriousness of the crime, individual responsibility, the victim and the interests of the wider community in imprisonment, pervade sentencing remarks. But in sentencing Indigenous offenders, these punitive themes rely on a particular construction of Indigenous communities as *dysfunctiona*l, or *non-functional*.[213]

She suggests that Indigenous justice requires a two-way recognition process where Indigenous people and their legal systems are afforded greater control in sentencing, dispute resolution and Indigenous healing.[214] The Koori Court may indeed be seen as a two-way recognition process.

VI Conclusion

This chapter is a brief overview of the struggle through the Anglo-Australian justice system experienced by Indigenous people over many years since colonial settlement and the ongoing disadvantage. These continue to resonate in the lives of many Aboriginal Australians who come in contact with the criminal justice system. As a non-Indigenous scholar, I am mindful of attempting to view scholarly literature through a decolonized lens, so that I may understand the Indigenous perspective of all the diverse issues which still confront Aboriginal Australians today.[215]

When reviewing the background of the early colonisation of Australia and its effects on Indigenous Australians, I have included significant reports relevant to my thesis, such as the initial Royal Commission into Aboriginal Deaths in Custody Report, 1991; the Aboriginal and Torres Strait Islander Social Justice Commissioner Reports, 1993 – 2017;

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[212] Ibid,71.
[213] Ibid.
[214] Ibid.
[215] Smith, L, *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, 2012), Zed Books.

and the Australian Law Reform Commission Final Report 2017. It is hoped that all these reports contribute to an understanding of the context of disadvantage experienced by Indigenous offenders in the criminal justice system which has not diminished over time. These reports have had a particular impact on the way laws and criminal justice have been addressed in recent decades, and underpin much of the rationale and meaning of the Koori Court and similar Indigenous courts throughout Australia.

Although data and reports alone cannot tell the complete story, the key information in these reports are relevant to this thesis. My findings in Chapters 6 and 7 of this thesis bring to life some of the voices of Indigenous defendants in the courtroom as they tell their personal stories and events which have brought them in contact with the law. The Koori Court process endeavours to provide an appropriate sentence and a fair outcome for the Koori defendant in a more culturally appropriate context, while keeping in mind the needs of society, the court and the victims of crimes. The aim of the Koori Court is to rehabilitate rather than imprison. Disadvantage for Koories might be addressed with access to services in areas such as health, education, and housing, so that outcomes improve and reoffending is diminished. This is an overall better result for all parties in the justice system.

The following chapter 3 sets out the origin of the Koori Court and its place in the hierarchy of the Victorian criminal justice system as a specialist Indigenous court. The chapter discusses the Victorian legal framework and the operation of the Koori Court from an interdisciplinary perspective, with a focus on the relationship between language and the law in the legal domain.

CHAPTER 3 KOORI COURT – LAW AND CONTEXT

I Introduction

Australian criminal courts of law operate within an adversarial, common law framework, maintaining observance of the rule of law, but they do not always consider underlying cultural or social factors.[1] Recommendations made by the Royal Commission into Aboriginal Deaths in Custody[2] proposed that the legal system be adapted to the cultural needs of Aboriginal offenders and their communities.[3] The administration of criminal justice has endeavoured to accommodate this, with the establishment of a number of non-adversarial courts throughout Australia.[4] This is one aspect of addressing the problem of over-representation of Indigenous offenders in the criminal justice system, to reduce the rates of reoffending by Indigenous people who come before the courts.[5]

This chapter sets out the origin of the Koori Courts and their place in the hierarchy of the Victorian criminal justice system as specialist Indigenous courts. It examines measures taken by the justice system over the past ten years to address the problem of the increased number of Koories[6] in the prison system, and concludes that there remains a need for

[1] King, M, Freiberg, A, Batagol, B, and Hyams, R, *Non-Adversarial Justice* (2009), Federation Press, 1.
[2] Commonwealth, Royal Commission into Aboriginal Deaths in Custody (RCIADIC), National Report (1991) Government Publishing Service.
[3] Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' court (Koori Court) Act 2002' (2003). Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003,4.
[4] In addition to the Koori Court in Victoria, there are a number of Indigenous courts in operation throughout Australia which include the Nunga Court in South Australia, the Circle Sentencing Court in New South Wales, the Murri Court in Queensland, also Indigenous courts in Northern Territory and Western Australia.
[5] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012), in Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 115-125.
[6] For the purpose of this thesis, the term 'Koori' is a distinct term which refers to an Indigenous Australian from the southern states of Australia. The term 'Indigenous' may refer to both Aboriginal and Torres Strait Islander Australians collectively, and Indigenous people more generally. Refer to Monash 'Inclusive Language' guide, at https://www.monash.edu/about/editorialstyle/writing/inclusive-language.

continued measures to redress some of the disadvantages experienced by Indigenous Australians, not only historically, but also in the courtroom.[7]

As mentioned in Chapter 1, this thesis situates the Koori Court in the justice system from an interdisciplinary perspective rather than a strict formalistic legal perspective. King et al propose that the ideas and practices of other social disciplines have added to the depth of legal thought.[8] This thesis views legal issues through a sociolinguistic lens, with broad reference to social science. The focus is on the relationship between language and the law in the legal domain and how changes in the way language is used in an Indigenous sentencing court may contribute to a fairer outcome for Indigenous offenders.[9] For the purpose of this thesis, only adult courts are investigated. Children's Koori Courts and Youth Justice issues are beyond the scope of the research.

Section Two of this chapter places the philosophy underpinning the Koori Court[10] within the wider body of work on restorative justice[11] and therapeutic jurisprudence.[12] The Koori Court endeavours to provide a non-adversarial justice system that is more culturally appropriate[13]

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[7] This was the theme of a conference on language, law and social justice co-presented by the Australian Systemic Functional Linguistics Association and the Sydney Institute of Criminology held at the Sydney University Law School, 7-9 December 2009.

[8] King, M, Freiberg, A, Batagol, B, and Hyams, R, *Non-Adversarial Justice* (2009), Federation Press, 11.

[9] The term 'offender' is used throughout this thesis in preference to 'the accused' or 'the defendant', although these terms may be used when quoting from other sources.

[10] The term 'philosophy' is used in this context when referring to the aims and goals of an Indigenous sentencing court, by a number of scholars including Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' court (Koori Court) Act 2002' (2003). Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003, 4; Marchetti, E and Daly, K, 'Indigenous Sentencing Courts' (2007), *29 Sydney Law Review*, 415; King, M, et al, *Non-Adversarial Justice* (2009), Federation Press, 1: and Popovic, J, 'Court Process and Therapeutic Jurisprudence: Have we thrown the baby out with the bathwater? (2006, 1 elaw Journal (Special series), 60, https://elaw.murdoch.edu.au/archibes/special_series.html.

[11] Restorative justice, broadly defined, seeks the restoration of victims, offenders and communities in the justice system. For further information, see Braithwaite, J, 'Principles of Restorative Justice' (2003) in Von Hirsch, A, et al, (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing;.King et al, *Non-Adversarial Justice* (2009), Federation Press, 39.

[12] Therapeutic jurisprudence is defined as 'a philosophy using law as a therapeutic agent in the lives of vulnerable people who require treatment more than (or in addition to) punishment'. (Castan Centre for Human Rights Law in their submission (No.60) to the Senate Committee on Justice Reinvestment, 2013).

[13] Marchetti, E, and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415. (Marchetti and Daly use the term 'culturally appropriate' when specifying the requirements of an Indigenous sentencing court that address cultural issues).

for a group of people who have been historically disadvantaged for more than 200 years since colonial settlement.[14] King et al note that Indigenous courts are 'built on notions of cooperation rather than conflict'.[15]

Section Three of this chapter discusses developments in the Victorian legal framework over the past decade. One of the main developments for Indigenous justice has been the partnership agreement between the government and the Koori community to improve justice outcomes for Koories. Of particular interest in the evolution of the partnership program has been the creation and expansion of the Koori Court program throughout Victoria.

In Section Four of the chapter, three issues relating to further developments in Aboriginal justice are discussed. The first issue is a marked increase over the period of the research in the number of Koori Courts throughout Victoria, which increases the accessibility for Koories to have their case heard in a culturally respectful court. This is coupled with a genuine collaboration between all stakeholders adhering to the Aboriginal Justice Agreement to address disadvantage and make the law more accessible to Indigenous offenders.[16] This is an essential part of the rehabilitative process. The second issue covers a landmark decision in 2013 by the High Court of Australia which recognised Indigenous disadvantage and impacted on the future sentencing of Aboriginal offenders.[17] The third issue of significance were the legislative reforms and government policies which led to the expansion of prisons to cater for the increased prison population due to changes in sentencing.[18]

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[14] Eades, D, *Courtroom Talk and Neocolonial Control* (2008) Mouton de Gruyter, (Colonial oppression and control is discussed widely, in particular, at 4-8).
[15] King, M, et al, *Non-Adversarial Justice* (2009), Federation Press, 15.
[16] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012), in Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 122.
[17] Bugmy v The Queen, (2013) HCA 37, 2 October 2013 at <http://austlii.edu.au/cases/cth/HCA/2013/37.html>.
[18] *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters)* Act 2013 (No.32 of 2013), enacted as part of the Victorian Government's 'tough on crime' policy; see also *Corrections Amendment (Parole Reform) Bill 2013.*

Section Five of the chapter reviews the concept of justice reinvestment as an alternative strategy for governments, where money spent on prisons is redirected to community activities which address the underlying causes of crime.[19] This thesis would support the application of this policy as a means of addressing the disadvantage experienced by many in the Indigenous community, as its implementation should have an impact on reducing the offending rate of Koories who are caught up in the Victorian justice system.

Section Six of this chapter outlines the jurisdictional scope of the Koori Court. This scope is confined to Indigenous offenders who have first gone through the mention system and have elected to have their case heard in the alternative Indigenous sentencing court. Offenders must plead guilty, and meet certain criteria before they are eligible. This is an informal, culturally appropriate sentencing court, which includes the participation of local community Indigenous Elders in administration of the law. The Koori Court follows the same fundamental procedures as the conventional court,[20] however there are limitations in the types of cases heard in the Koori Court; these must not involve a breach of family violence orders or sexual assault.[21]

Section Seven of the chapter reviews the operation of the Koori Court, and provides a comparative analysis where the process and practice of this court departs from that of conventional courts. Traditionally, courts are framed in a formalistic and hierarchical manner, both in physical layout and linguistic discourse between participants. Many are familiar with the conventional setting, where the judge or magistrate sits at an elevated bench, with legal professionals at the bar table and the accused in the dock. However, Koori Courts are unique and different in both process and practice.[22]

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[19] See reference to the initiative of justice reinvestment in Texas, USA, at <http://www.rightoncrime.com/reform-in-action/state-initiatives/texas>.
[20] Hulls, R, 'A Question of Koori Justice' (2008). Speech given by the Attorney-General at the launch of the County Koori Court, Morwell, on 19 November, 2008. For further information, see <https://www.smh.com.au a-question-of-Koori-Justice>.
[21] Magistrates' Court of Victoria Annual Report 2006-2007, 42.
[22] Stroud, N. 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), *Australian Law Librarian,* 18, 3, 184-192.

Section Eight discusses the way language is used in the Koori Court, and the communicative process of the informal 'sentencing conversation' which is integral to justice in the legal domain for Indigenous offenders.[23] In the Koori Court, the language changes from precise, legal terminology as in the conventional court, to a simplified version which is more relevant and understandable and therefore more effective when used in a new way in this alternative sentencing environment.[24]

Section Nine reviews a number of evaluations of Australian Indigenous sentencing courts which were conducted over the past decade or more. Of particular interest to this thesis, are those evaluations conducted specifically of the Koori Court of Victoria.[25] I intend to include, however, other scholarly research papers which provide a comparison of Indigenous courts and justice practices in a broader context, where they review the process and practice of the Koori Court.

Finally, Section Ten of this chapter summarises measures taken so far by the Koori Court since its inception in addressing the problem of the increased number of Koories in the justice system. The chapter concludes that although the Koori Court with its changes in court process and practice has had considerable success in rehabilitating offenders and reducing reoffending over the past decade, more needs to be done in addressing the continuing disadvantage experienced by Indigenous Australians which brings them into negative contact with the law.

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[23] 'Sentencing Conversation' is a term coined by inaugural Magistrate Auty at the Shepparton Magistrates' Koori Court, which describes very well the participative dialogue of the Koori Court hearing.

[24] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012), in Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 121-122. See also Magistrates' Court of Victoria Annual Report, 2003-04,30.

[25] Evaluations were carried out on the Koori Magistrates' Courts in Shepparton and Broadmeadows (Harris, M, *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002- October 2004* (2006), Department of Justice; Borowski, A, *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria, 2009* (2009), Victorian Law Foundation; and Dawkins, Z, et al, (eds), *County Koori Court Final Evaluation Report*, (2011), Victorian Department of Justice. All cited evidence of improvement in the experience of the Koori offender in the Koori Court program.

II Philosophy of the Koori Court

This chapter deliberately adopts the term 'philosophy' to indicate the underlying goals, purposes and theoretical underpinnings of the Koori Court. It draws upon the work of a number of scholars who refer to Indigenous sentencing courts, as mentioned in the introduction to this chapter.[26] The theoretical underpinning of this court is grounded in principles of non-adversarialism and reflects broad concepts of restorative justice and therapeutic jurisprudence.[27]

The *Magistrates' Court (Koori Court) Act* 2002 was passed in the Victorian parliament[28] to establish the Koori Division of the Magistrates' Court of Victoria. The purpose of the Act was to:

> provide for the jurisdiction and procedure of that Division –
> with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal elder or respected person and others.[29]

Two further Acts were legislated for the establishment of Koori Courts with similar aims and objectives, namely the *Children and Young Persons (Koori Court) Act* 2004, for the establishment of a Children's Koori division in the Magistrates' Court,[30] and in the higher jurisdiction of the County Court, the *County Court Amendment (Koori Court) Act* 2008 for the establishment of the County Koori Court. [31]

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[26] The term 'philosophy' is used in this context when referring to the aims and goals of an Indigenous sentencing court, by a number of scholars including Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' court (Koori Court) Act 2002' (2003), Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003, 4; Marchetti, E and Daly, K, 'Indigenous Sentencing Courts' (2007), *29 Sydney Law Review*, 415; King, M, et al, *Non-Adversarial Justice* (2009), Federation Press, 1: and Popovic, J, 'Court Process and Therapeutic Jurisprudence: Have we thrown the baby out with the bathwater? (2006, 1 elaw Journal (Special series), 60, https://elaw.murdoch.edu.au/archibes/special_series.html.
[27] King, M, Freiberg, A, Batagol, B, Hyams, R, *Non-Adversarial Justice* (2009), The Federation Press.
[28] *Magistrates' Court (Koori Court) Act*, 2002, Section 6. 4D.
[29] Ibid.
[30] *Children and Young Persons (Koori Court) Act 2004.*
[31] *County Court Amendment (Koori Court) Act 2008.*

The Koori Court implements a strong commitment to provide a non-adversarial forum for Indigenous offenders in a less formal and more culturally appropriate setting.[32] King describes non-adversarial justice as practiced in an Indigenous court as a 'collaborative process which deals with the crime in a way that has a solution-focused outcome of rehabilitation and reconnection of the offender with the community'.[33] According to Harris, who conducted one of the first reviews of the Koori Court, the Koori Court seeks to incorporate a 'cultural dimension into sentencing so as to address the underlying causes of criminality in the individual'.[34] The emphasis of the court is on rehabilitation of the offender rather than punishment. In the Koori Court, principles of restorative justice[35] and therapeutic jurisprudence[36] are broadly interpreted and applied by the Koori Court to achieve a positive outcome in changing behaviour, reconnecting the offender with their family and restoring balance in the community.

Over the years there have been conflicting views by academics and others as to how to define some of the concepts which underpin the Koori Court. On the one hand, the inaugural Magistrate of the first Koori Court in Shepparton, Magistrate Auty, considered that broad aspects of restorative justice and therapeutic jurisprudence underpin the philosophy of the court.[37] On the other hand, in 2007, Marchetti and Daly, leading reviewers of the Court, argued that although Indigenous sentencing courts have some elements in common with these practices, Indigenous courts go beyond those mainstream discourses and have

[32] See Operating Manual of the Koori Court, Broadmeadows (2005), 7-8; also Magistrates' Court Annual Report 2007-08, 55.
[33] King, M et al, *Non-Adversarial Justice* (2009), Federation Press.
[34] Harris, M, 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) In King, M and Auty, K (eds) *The Therapeutic role of Magistrates' Courts*, 130.
[35] King et al, *Non-Adversarial Justice* (2009), Federation Press, 42-43; Braithwaite, J, 'Restorative Justice and Therapeutic Jurisprudence' (2002), 38 *Criminal Law Bulletin*, 244; Johnstone, G, and Van Ness, D, 'The Idea of Restorative Justice', (2007), in Johnstone, G and Van Ness, D (eds), *Handbook of Restorative Justice,* Willan Publishing.
[36] Winick, B, and Wexler, D, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, (2003), Carolina Academic press, part 1, 1.
[37] Auty, K 'We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) 1 elaw Journal 101.

distinct aims and objectives specific to the Indigenous context in which they operate.[38] Others such as Braithwaite, a restorative justice researcher,[39] believe that restorative justice principles should be fundamental to all human interactions.

In '*Handbook of Restorative Justice'*, editors Johnstone and Van Ness suggest that restorative justice is best understood as a deeply contested concept.[40] They note that 'some restorative justice proponents refer to *values* as a key means of distinguishing restorative justice from other approaches to crime and wrongdoing'.[41] In her work on criminal justice responses, legal academic Daly suggests that restorative justice is not an alternative to retributive justice, it is an alternative form of punishment.[42] This prompts a further question, whether procedural justice may be included as a concept when punishment is linked to the restorative justice process.[43]

Some aspects of restorative justice as applied in the Koori Court process are essential to a positive outcome of the court process, and these can be outlined in brief. Firstly, the process must include the direct participation of the offender, who must be held accountable, accept responsibility for the offence and be willing to stop offending.[44] Secondly, the presence of Indigenous Elders at the hearing emphasises to offenders the 'shame'[45] of letting down the Elders of their community. The Elders condemn the behaviour but offer encouragement to the offender to turn their life around. Thirdly, the participation of support services and follow up after sentencing ensures that the offender will not slip back into old habits and

[38] Marchetti, E, and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415.
[39] Braithwaite, J. 'Principles of Restorative Justice' (2003), in Von Hirsch, A, Roberts, J, Bottoms, A, Roach, K and Schiff, M (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing.
[40] Johnstone, G and Van Ness, D, 'The Idea of Restorative Justice' (2007), in Johnstone, G and Van Ness, D (eds) *Handbook of Restorative Justice*, part 1, at 1.
[41] Ibid, 2.
[42] Daly, K., 'Revisiting the Relationship between Retributive and Restorative Justice' (2000), in Strang, H, and Braithwaite, J (eds). *Restorative Justice: Philosophy to Practice,* Dartmouth Publishing Company, 33-54.
[43] Tyler, T, 'Procedural Justice and the Courts', (2008), *American Judges Association*, *Court Review*, 44, 26.
[44] Morris, A, and Young, W, 'Reforming Criminal Justice' (2000), as cited in Johnstone, G., *Restorative Justice: Ideas, values, debates* (2002). Willan Publishing, 17-18.
[45] 'Shame' is a specific cultural concept in Koori communities, and can be a powerful punishment of itself.

friends. One limitation of the application of generalist restorative justice principles in the Koori Court is that the victim does not have an active role in the process, which is mainly concerned with restoring balance, repairing harm and reintegrating the offender into the community.

When reflecting on the concept of restorative justice, criminologist Roche points out that important elements 'are in fact part of an original, authentic, and natural approach to justice'.[46] King et al perceive that 'the modern rise of restorative justice is seen almost as a return to this natural original, authentic and successful approach to justice'.[47]

The concept of therapeutic jurisprudence as applied in the Koori Court is based on concepts developed by leading proponents David Wexler and Bruce Winick in the 1980's,[48] and is concerned with how the legal process impacts on the wellbeing of participants. Although first applied in the context of mental health law, therapeutic jurisprudence using techniques of behavioural science in its application is now applied to all areas of the law and across cultures.[49]

Auty observes that 'jurisprudence is a broad church, porous and sometimes surprising or paradoxical',[50] and suggests that 'therapeutic interaction (…) may be many things to many people'. This is also the view of Marchetti and Daly, who agree that therapeutic jurisprudence involves many perspectives and perceptions of the 'law' itself.[51]

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[46] Roche, D, *Accountability in Restorative Justice,* (2003) Oxford University Press, 12. (also cited in King et al, *Non-Adversarial Justice* (2009) at 45-46).
[47] King, M, et al, *Non-Adversarial Justice* (2009), Federation Press, 46.
[48] Winick, B, and Wexler, D, '*Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts'* (2003) Carolina Academic Press.
[49] The concept of therapeutic justice is discussed at <www.aija.org.au/index.php/research>.
[50] Auty, K 'We Teach All Hearts to Break – But can we mend them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006), elaw Journal, 106-107.
[51] Marchetti, E, and Daly ,K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review,* 415.

The National Judicial Institute in Canada[52] defines therapeutic jurisdiction as 'a judicial system that both considers the complex, social, economic and cultural factors that cause Aboriginal people to be in conflict with the law, and takes a healing approach to sentencing'. This thesis agrees with this definition because it best represents the current practice of the Koori Court which allows the offender to change their behaviour and reintegrate into society.

In keeping with the main aim of the Koori Court to address the high number of Indigenous people in the criminal justice system,[53] the court works to address any underlying causes of disadvantage which may have contributed to the offence. Time is allowed for the offender to tell their story in court and time is taken to address the often multiple issues which could be revealed, such as drug and alcohol addiction, inadequate housing, poor health, lack of education or unemployment difficulties. Follow up support services and rehabilitation programs are then arranged where necessary. This is in order that the court have an impact on the 'revolving door' effect of re-offending, and support the offender as a means of addressing the diverse personal and social issues. Figure 1 illustrates the cycle of reoffending. The Koori Court aims to interrupt the cycle at the court stage.

Figure 1: The Cycle of Reoffending[54]

[52] Goldberg, S, 'Judging for the 21st Century: A problem Solving Approach' (2005) Ottawa: National Judicial Institute Handbook for Judges, at 1. Cited in Harris, M 'The Koori Court and the Promise of Therapeutic Jurisprudence '(2006), in King and Auty (eds) *The Therapeutic Role of Magistrates' Courts* at <https://elaw.murdoch.edu.au/archives/issues/special/TJELAW2.pdf>, 130.
[53] See *Magistrates' Court (Koori Court)* Act 2002, Act No. 27/2002, 4F.
[54] Stroud, N, 'The Koori Court of Victoria: A Restorative Justice Perspective of Cultural and Language Difference in an Alternative Sentencing Court' (2009). Paper presented at the language, Law and Social Justice

The court has a philosophical commitment[55] to seek alternatives to prison such as diversion programs for first time offenders;[56] the Court Integrated Services Program (CISP);[57] and support programs which deal with underlying issues such as for drug and alcohol addiction;[58] anger management; lack of suitable Indigenous housing, education opportunities or employment. Support by the Indigenous community is also a major factor in keeping Koories out of prison. Follow-up after the hearing by court officers ensures the defendant keeps court appointments and prevents a 'failure to appear' for bail or community correction orders, one of the reasons for Indigenous re-offending.

An examination of the Koori Court operation shows it manifests these philosophical objectives in a wide variety of its procedures and practices.

III Developments in Victorian Legal Framework

The Victorian criminal justice system operates within a Common Law framework following the Westminster legal tradition of law-making, and as legislated by the Victorian parliament. The hierarchy of the Victorian court system places the specialist Koori Court in two jurisdictions in the middle tier of the court hierarchy, namely the County Court of Victoria and the Magistrates' Court of Victoria.

Conference, co-presented by the Australian Systemic Functional Linguistics Association and the Sydney Institute of Criminology, December 2009, Sydney Law School, University of Sydney.

[55] See the Operating Manual for the Koori Court, Broadmeadows Koori Court (2005), 3-4, for an explanation of the philosophy of the Koori Court which was implemented following recommendations by the Royal Commission into Aboriginal Deaths in Custody 1991, which led to the partnership between the Victorian Government and the Aboriginal community

[56] As previously explained, an example of a successful diversion program for young Indigenous men is the Wulgunggo Ngalu Learning Place in Gippsland, where they can improve their skills, reduce substance abuse, and learn about some of their Indigenous heritage.

[57] A court-based support program which supports participants to address their health and/or social needs with an aim to reduce the likelihood of re-offending. See Magistrates' Court of Victoria Annual Report 2017-18,17.

[58] An example of this is Odyssey House, a residential rehabilitation program with live-in treatment open to those suffering alcohol and drug addiction.

In reviewing the developments which have brought meaningful access to the law for Indigenous people, it is necessary to provide a brief history of the partnership in justice reform between the Victorian government and the Koori community. This partnership evolved from the initial Aboriginal Justice Agreement Phase One (AJA) in 2000, which set out the foundations of the agreement, and expanded to Aboriginal Justice Agreement Phase Two (AJA2) in 2006, followed by the Aboriginal Justice Agreement Phase Three (AJA3) in 2013, and more recently, Aboriginal Justice Agreement Phase Four (AJA4) in 2018, all of which have continued the programs designed to improve Koori interactions within the Victorian justice system.[59] These will now be reviewed in more detail.

The first Victorian Aboriginal Justice Agreement (AJA1) was initiated in 2000 as a response to the release of the final report of the Royal Commission into Aboriginal Deaths in Custody in 1991, to tackle Indigenous over-representation in the criminal justice system and improve justice outcomes for Aboriginal people in all areas where disadvantage was experienced.[60] A strategic framework was developed aimed at reducing Aboriginal contact in the corrections system, and this was to cover all areas of government, in particular employment, education, health, community services and economic development.[61] Aboriginal participation in the development of policies and programs in all areas was paramount. This first Aboriginal Justice Agreement led to the establishment of the first adult Koori Court division in the Magistrates' Court in 2002.[62] The *(Koori Court) Act* 2002 sought to provide a culturally appropriate legal framework to break the cycle of overrepresentation of Indigenous defendants in the criminal justice system.[63]

[59] Victorian Aboriginal Justice Agreements Phase One, (2000), Phase Two, (2006), Phase Three (2013), and Phase Four (2018). Victorian Government.
[60] Royal Commission into Aboriginal Deaths in Custody (RCIADIC), National Report (1991), Australian Government Publishing Service.
[61] Victorian Aboriginal Justice Agreement (2000), Victorian Government.
[62] *Magistrates' Court (Koori Court)* Act 2002.
[63] Magistrates' Court of Victoria Annual Report 2003-04,30.

The second phase of the Victorian Aboriginal Justice Agreement (AJA2) was launched in 2006.[64] This built on the framework developed in Phase One of preventing and reducing the progression of young Koories into the criminal justice system and reducing re-offending of those young people and adults already in the system.[65] In addressing the disadvantage that underlies many of the difficulties experienced by Aboriginal Australians, AJA2 noted that socioeconomic disadvantage was a powerful contributor to social disconnection in communities.[66] AJA2 recognised the importance of programs that encourage the participation of Koori young people in education and employment as an appropriate intervention to keep Koori youth from entering the criminal justice system.[67] For those already in the prison system, AJA2 supported participation in programs of rehabilitation and preparing Koories properly for their release and integration into the community.[68] A priority concern was the implementation of partnership structures at a local, regional and state-wide level, for example Local Aboriginal Justice Action Committees (LAJAC); Regional Aboriginal Justice Advisory Committees (RAJAC); and the state-wide Aboriginal Justice Forum (AJF),[69] working together with government, the Koori Courts and support services, with the aim of addressing risk factors for crime and working towards a reduction in reoffending.[70]

The third phase of the Victorian Aboriginal Justice Agreement (AJA3)[71] launched in 2013, built on initiatives from previous agreements to maintain a focus on prevention, early intervention and diversion of Koories at risk to reduce progression into the justice system.[72] Key aims of this agreement were for support for services and behaviour programs to address alcohol and drug dependency, anger management, mental health problems, unemployment and inadequate housing, and provide follow-up and monitoring of Indigenous offenders.[73]

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[64] Victorian Aboriginal Justice Agreement, Phase Two, (2006), Victoria Government.
[65] Ibid, 11.
[66] Ibid, 13.
[67] Ibid, 16.
[68] Ibid.
[69] Ibid, at 17.
[70] Ibid, at 9.
[71] Victorian Aboriginal Justice Agreement, Phase Three, (2013), Victorian Government.
[72] Ibid, 4, paragraph 5.
[73] Ibid.

An additional focus in this agreement appears to be on "reducing conflict and violence (…) to improve community safety".[74] Phase Three of the Agreement continued support for the expansion of the Koori Court program throughout Victoria in locations where there is a high Indigenous crime rate.

Then in 2018, the fourth phase of the Victorian Aboriginal Justice Agreement (AJA4) was launched, with the name of *Burra Lotjpa Dunguludja,* meaning Senior Leaders Talking Strong.[75] This new Agreement builds on the foundation of past Agreements, and marks the 18th anniversary of the first Victorian Aboriginal Justice Agreement, reflecting on the great change over the years to strengthen Aboriginal oversight of justice outcomes for Aboriginal people. The core policy approach of the Agreement is to continue to address Aboriginal over-representation across the justice system, and to progress Indigenous self-determination.[76] It does so by focussing more than ever on the important roles of family and therapeutic cultural healing to tackle offending especially for young people, and considers economic independence and stability for Aboriginal families critical to reducing offending.[77] In defining what self-determination means to Aboriginal people in the justice context, the Agreement reflects the long-term vision for an Aboriginal community-controlled justice system including the continued expansion of Koori Courts throughout Victoria.[78]

The following map shows some of the early court locations since the first Koori Courts were established in Victoria in 2002.[79] Koori Courts have now been extended throughout Victoria, in County Court, Magistrates' Court and Children's Court jurisdictions, all with Indigenous communities working together in partnership with the Victorian Government and the Courts

[74] Ibid, 4.
[75] Victorian Aboriginal Justice Agreement (AJA4), (2018), Victorian Department of Justice, Melbourne.
[76] Ibid, 7.
[77] Ibid.
[78] Ibid, 47.
[79] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2009). Paper presented at the Ninth Biennial Conference of the International Association of Forensic Linguists, July 2009, Amsterdam. Map prepared by Monash University Geography Department, 2009.

on strategies to close the gap between rates of Aboriginal and non-Aboriginal people in the prison system.

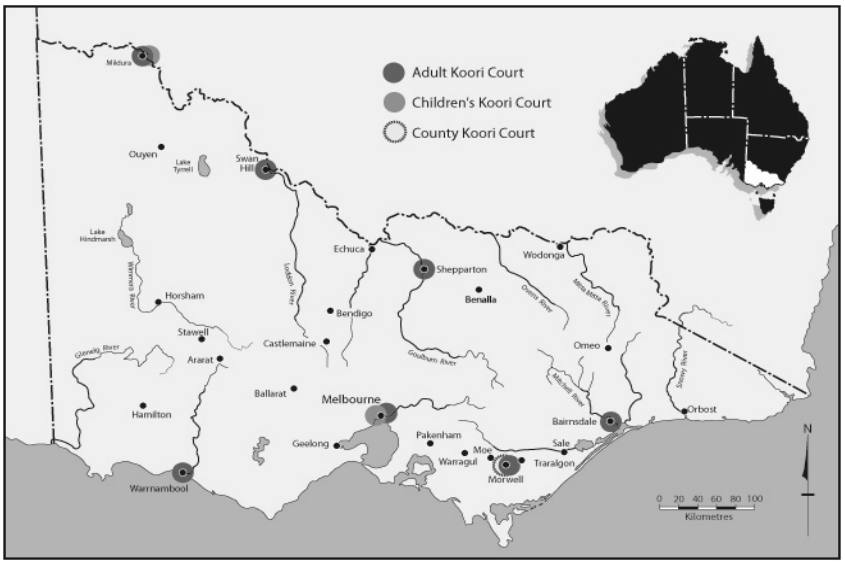

Figure 2: Location of Koori Courts throughout Victoria in 2009[80]

The first Koori Court, under the jurisdiction of the Magistrates' Court of Victoria, commenced in 2002 in Shepparton (Yorta Yorta and Bangerang country). This was followed by courts opening in Broadmeadows in 2003 (Wurundjeri country), Warrnambool in 2004, (Gournditchmara country), Mildura in 2005 (Ledji Ledji country), Latrobe Valley in 2006, Bairnsdale in 2007 (Ganai Kurnai country), and Swan Hill in 2008[81] (Wamba Wamba country). This number has now expanded to twelve adult Koori Courts in the Magistrates' jurisdiction.[82] At the same time, Children's Koori Courts for 10-17 year-olds were established in Melbourne in 2005, Mildura in 2007, Warrnambool, Bairnsdale and La Trobe Valley, with a later expansion of the program to twelve Children's Koori Courts throughout Victoria.[83]

[80] Ibid.
[81] The Swan Hill Koori Court uses the local traditional language of Wamba Wamba to open and close each court session. During the hearing, Elders and Respected Persons present Cultural Statements to defendants on how their actions relate to important cultural principles and how they must change (AJA3, 2013, at 43). See AJA3, 2013 for further information.
[82] Magistrates' Court of Victoria Annual Report, 2016-2017.
[83] The first Children's Koori Court was established in Melbourne in 2005. There are now twelve Children's Koori Courts in operation throughout Victoria). See Children's Court of Victoria, Annual Report 2017-2018.

Based on the success of the pilot program, the County Koori Court,[84] under the jurisdiction of the County Court of Victoria, opened in Morwell in regional Victoria in 2008, followed by the County Koori Court in Melbourne in 2013. These two courts were Australia's first higher jurisdiction sentencing courts for more serious cases of Indigenous offending. A further three County Koori Courts have now been established in Victoria at Mildura, 2016, Shepparton, 2018 and Warrnambool, 2019.[85] Prior to the establishment of each Koori Court in all jurisdictions, extensive consultation was carried out with the local Indigenous community.[86] The participation of Koori Elders in the administration of the law remains an important factor in the success of the Koori Court program. During the 2017-2018 year, eighteen new Elders and Respected Persons joined the Koori Court.[87]

Programs previously initiated in the conventional court system, such as the CREDIT/Bail, Court Integrated Services Program (CISP),[88] drug and alcohol programs and diversion programs, are all accessed by the Koori Courts in its sentencing arrangements. It is interesting to note that the conventional Magistrates' Court has now appointed Koori Liaison Officers as part of the CISP multidisciplinary team, who are available for consultation with Koori accused prior to their case being heard in the conventional court, but do not participate on the day of hearing.

Ongoing programs and partnerships between the government, the courts, support services and the Indigenous community are continually examined, reassessed, and recommitted to by stakeholder signatories of the Agreement.[89] Sentencing option initiatives appear to have encouraged greater participation and accountability of the Koori community. Leadership

[84]Established under the *County Court Amendment (Koori Court) Act* 2008.
[85] County Court Annual Report 2016-2017, Victoria; see also Howard, J, 'New County Koori Court for Warrnambool', (25 September 2019)), <https://www.standard.net.au/story/6403498/new-koori-court-to-be-launched-in-city>.
[86] Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' Court (Koori Court) Act 2002' (2003). Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003,4.
[87] Magistrates' Court of Victoria, Annual Report, 2017-2018, 17.
[88] Ibid.
[89] Victorian Aboriginal Justice Agreements, Phase Three, (2013), and Phase Four (2018), Victorian Government.

roles, mentoring of apprenticeships, job search, and follow-up of literacy and numeracy programs are all part of the aim to reconnect young Koories with the community.[90]

Education and training have been an essential part of the Koori Court program since its inception.[91] This has included training in cultural awareness of general court staff; professional development seminars for the judiciary and Elders; and training of Elders and Respected Persons in administration of the law.[92] These have been organised in collaboration with the courts and judicial colleges.[93]

IV Further Aboriginal Justice Issues

In seeking to address the ongoing issue of disadvantage experienced by Indigenous offenders, the government and Koori community representatives continually review developments in the administration of, and accessibility of justice in accordance with Aboriginal Justice Agreements.[94]

As Aboriginal Justice Agreements continue to expand, Aboriginal people work together to improve justice outcomes and work towards self-determination, with a focus on family, community, culture and country.[95] In August 2018, in a submission to the Joint Select Committee on Constitutional Recognition, current Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar, and all former social justice commissioners, Mick Gouda,

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[90] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 122-123.

[91] Education and professional development programs are run by the judicial Colleges, for example, the Victorian College of Judicial Administration, National Judicial College of Australia and Australian Institute of Judicial Administration; see also Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' court (Koori Court) Act 2002' (2003), Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003,10, for training of Elders.

[92] Magistrates' Court Annual Report 2006-07, 42,43.

[93] For further information, see yearly Magistrates' Court of Victoria Annual Report 2017-2018 and Judicial College of Victoria Annual Report 2017-2018.

[94] Victorian Aboriginal Agreement Phase 3 (2013), 3; and Phase 4 (2018), Victorian Government.

[95] Victorian Aboriginal Justice Agreement (Phase 4), Victorian Government, 3.

Tom Calma, William Jonas and Mick Dodson, called on the Federal Parliament to commit to achieving constitutional reform in five years.[96]

Following a shift in public and government attitude to crime to 'take the criminals off the streets',[97] which occurred in the early days of this research, legislative reform was enacted by the government in 2013 to increase punitive measures for punishable offences and introduce sentencing changes such as the abolition of suspended sentences,[98] proposed mandatory minimum sentences,[99] and the revoking of parole conditions of prisoners. This resulted in the returning of prisoners to overcrowded prisons, with an increase in delays in court hearings and a high number of unsentenced prisoners in custody. In addition, Judges and Magistrates in the mainstream courts were reported as working at night and weekends to cope with the case load.[100] This legislation and change in policy had a marked impact on sentences handed down in cases heard for Aboriginal offenders.

However, in the Koori Court, the Magistrate or Judge, while following precedent as in a conventional court, continues to have judicial discretion to assess each case on its merit, taking into consideration any underlying factors behind the offence.[101] Previous legislation allowed for a restorative and therapeutic approach to sentencing which was adapted to meet the needs of the offender, as well as the community.[102]

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[96] *National Indigenous Times*, 'Social justice commissioners deliver five-year deadline on constitutional change', August 22, 2018.
[97] Gregory, J. 'Stepping out of the shadow' (2011) ,85 *Law Institute Journal* 3, 85.
[98] *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters),* Act 2013 (No.32 of 2013), enacted as part of the Victorian government's 'tough on crime' policy'; The *National Deaths in Custody Watch Committee (Black Deaths Watch),* (2008) were the primary Indigenous commentators on the deaths in custody between 1980 and 1989, formed to monitor and ensure the effective implementation of the 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody. This led to the establishment of a National Deaths in Custody Monitoring and Research Program at the Australian Institute of Criminology, Canberra, 2008. See Australian Bureau of Statistics, 1301.0, YearBook of Australia (2012); and Australian Institute of Criminology Report No.10, *National Deaths in Custody Watch Committee (Black Deaths Watch)* (2008).
[99] The Human Rights Law Centre (HRLC), in a submission to the Senate Inquiry into Justice Reinvestment 2013, noted that 'mandatory sentencing laws limit judicial discretion in sentencing, and prevent courts from taking account of cultural background and responsibilities of offenders.
[100] Wilmoth, P, 'Judge Dread', *The Age*, August 4, 2018.
[101] Senate Legal and Constitutional Affairs References Committee Report on 'Value of a justice reinvestment approach to criminal justice in Australia', 2013, 7.
[102] Sentencing Advisory Council Baseline Sentencing Report 2012, 134.

The expansion and building of new prisons to cater for the increased prison population resulted in a subsequent increased cost to the government. The overcrowding of prison cells and local police lock-ups, prompted police leadership to question whether this may lead to prisoner riots in the future.[103] Magistrates are increasingly frustrated with delays in cases when prisoners fail to be transferred from Corrections Victoria to the courts, due to insufficient space in the custody centre under the Magistrates' Court.[104] The government has responded by increasing the prison facilities at Ravenhall from 500 beds to accommodate 2,000 prisoners.[105] As Koories are disproportionately overrepresented in the Victorian prison population,[106] any additional stress on the prison system could have a greater impact on the Koori prisoners and even the relationship with the Koori community in general. It must be emphasised here that Aboriginal Victorians' status as First Peoples is reinforced by the *Charter of Human Rights and Responsibilities Ac*t (2006),[107] which acknowledges their distinct cultural rights and perspectives, and recognises their culture, history, diversity and deep connection to the land.

Another development which may have an impact on Aboriginal justice is the landmark judgment handed down by the High Court of Australia in 2 October 2013 that allowed Aboriginal man William Bugmy[108] to appeal the decision of the Court of Criminal Appeal to re-sentence him to five years' imprisonment without parole. The original sentence in the District Court of New South Wales was four years jail for intentionally causing grievous bodily harm to a correctional services officer. The High Court reasoned that a 'person's Aboriginal background may reduce their sentence if they come from a deprived or disadvantaged background', as the effects of profound disadvantage do not diminish over time.[109] The

[103] Tomazin, F, 'Overcrowded prisons stretched to breaking point', *The Sunday Age*, 1 September 2013, 8; Kaila, J, 'Police Cells spill over'. *The Herald Sun* 31 August 2013, 4.
[104] *The Age,* Editorial, 28 October 2013, 16.
[105] Gordon, J, 'Ravenhall prison capacity to double, as more do time under tough –on- crime', *The Age,* News, 20 September 2013, 4.
[106] Corrections Victoria, Statistical Profile of the Victorian Prison System 2010-11, 12.
[107] *Charter of Human Rights and Responsibilities* Act 2006, No.43 of 2006.
[108] Bugmy v The Queen, (2013) HCA 37, 2 October 2013 at <http://austlii.edu.au/cases/cth/HCA/2013/37.html>.
[109] Ibid.

order by the High Court was to remit the matter to the Court of Criminal Appeal. This important decision is indicative of the changing environment of Aboriginal sentencing. Although the decision may result in changes to sentencing in the conventional court, in the Koori Court consideration is already given to underlying factors of Indigenous disadvantage by the Judge or Magistrate when deciding on an appropriate sentence.

V Justice Reinvestment

One innovative program that may have a future impact on the number of people in the prison system is that of Justice Reinvestment,[110] which originated in the conservative states of Texas and Michigan in the United States. Policy initiatives carried out by the US government redirected money away from the building of more prisons, into community-based programs such as speciality courts, treatment programs, education and support services, with the aim of addressing the underlying causes of crime and cutting the number of people in prison.[111]

Since its inception in 2008 in the United States, the concept of justice reinvestment has received favourable consideration in several countries around the world, including the United Kingdom, New Zealand and Australia.

The Australian Law Reform Commission Report in 2017, suggests there has been strong support in Australia for taking a justice reinvestment approach to redirect resources spent on incarceration in order to better address the causes of Aboriginal and Torres Strait Islander offending.[112] This report contrasts two different forms of justice reinvestment: a social justice and a criminal justice approach, which are not necessarily mutually exclusive. Many of the submissions to the ALRC Commission observed that reforming laws regarding

[110] For further information, see reference to the initiative of justice reinvestment in Texas at <http://www.rightoncrime.com/reform-in-action/state-initiatives/texas>.
[111] Ibid.
[112] Australian Law Reform Commission Report 133, December 2017, 125.

sentencing could have an effect on the imprisonment rates for Aboriginal and Torres Strait Islander people, however diversion and community-based alternatives must also be in place so that disadvantage may be addressed and long-term rehabilitation occur.[113]

A number of submissions to the Victorian Senate Inquiry in 2013 were also received from many organisations in favour of trialling the justice reinvestment approach. These included organisations with a strong social justice platform such as the Jesuit Social Services,[114] who noted that Victoria's 'tough on crime' policy had resulted in an increase in average daily prison population.

Further submissions to the Victorian Senate Inquiry were made by the Law Council of Australia who, in their submission, agreed that underlying causes behind the offence increase the risk of Indigenous people becoming involved in crime.[115] The Castan Centre for Human Rights Law also noted that an Indigenous person is fifteen times more likely to be imprisoned than a non-indigenous person in Australia.[116] Professor Chris Cunneen commented in his submission that 'the strong community development focus of the justice reinvestment approach, in redirecting money away from the prison system, strengthens and builds affected communities'.[117]

The above submissions to the Senate Committee all support my argument that the justice reinvestment approach, which redirects the money spent on the building of new prisons to redirect it back into services that would build up treatment programs, education and training for the Indigenous community, would benefit young Koories and help keep them out of prison.

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[113] Submissions to the Australian Law Reform Commission, 2017, include the Jesuit Social Services, Submission 100; Victorian Aboriginal Legal Service, Submission 39; Victorian Legal Aid, Submission 56; Human Rights Law Centre, Submission 68, 128-132.
[114] Victorian Senate Inquiry (2013), Jesuit Social Services submission No. 104.
[115] Law Council of Australia submission No. 97 to the Senate Committee 2013.
[116] Castan Centre for Human Rights Law submission No. 60 to the Senate Committee 2013, 5.
[117] Submission to the Senate Committee by Professor Chris Cunneen, Chief Investigator, Australian Justice Reinvestment Project Committee, Hansard 1 May 201, 58.

The Australia Law Reform Commission recommended that Commonwealth state and territory governments support place-based community-led justice reinvestment initiatives, through resourcing and facilitating participation and coordination between relevant government departments to address offending and incarceration.[118]

Following this direction, chief investigators for the Australian Justice Reinvestment Project, Schwartz, Brown and Cunneen reviewed the justice reinvestment approach of the Bourke Aboriginal community, which developed a model to reduce the involvement of young people in Bourke, New South Wales, in the criminal justice system.[119] The project receives funding and in-kind support from non-government sources, which gives the Aboriginal community more control over setting priorities.[120] The Maranguka initiative in Bourke began implementation in 2016,[121] and has received positive reviews. Several other Australian states are trialling or are at the basic concept stage of the justice reinvestment model.[122]

There has also been significant support for justice reinvestment from two successive Aboriginal and Torres Strait Islander Social Justice Commissioners, Tom Calma, AO and Mick Gooda,[123] who spoke of the many challenges facing Aboriginal and Torres Strait Islander people, their families and the community.[124] Gooda stressed that while prison must be an option for some who need to be separated from society, it should only be used as an option of last resort. A better solution would be to support the approach of justice reinvestment to

[118] Australian law Reform Commission Report, 133, (2017), 4.6, 126.
[119] Schwartz, M, Brown, D, and Cunneen, C, 'Justice Reinvestment' (2017), In *Indigenous Justice Clearinghouse,* Brief 21, July 2017.
[120] Schwartz, M, et al, 'Justice Reinvestment' (2017), *Indigenous Justice Clearinghouse*, 5.
[121] Australian Law Reform Commission Report, (2017), 4.47,137. See <www.justreinvest.org.au/justice-reinvestment-in-bourke>.
[122] For more information, see https://justice reinvestment.net.au/community-profiles/bourke-new-south-wales.
[123] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Human Rights Commission, 2016); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (Australian Human Rights Commission 2014); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* 2009 (Australian Human Rights commission, 2009).
[124] Mick Gooda, address to Judges at Brisbane conference on 27 June 2013.

reinvest it in local community projects such as intervention and rehabilitation which deal with issues of disadvantage.

Victorian Magistrate Jelena Popovic also supports justice reinvestment as a proper strategy in addressing the shameful incarceration rates in Victoria, which has had a 105 per cent increase of Koori offenders since 2002, compared with 20 per cent of non-Koori offenders.[125]

This thesis strongly supports the many calls for adoption of a justice reinvestment strategy in Victoria, as one of the key drivers to address Indigenous disadvantage and therefore reduce the number of Indigenous people in the Victorian prison system. Unfortunately, it appears that the Victorian government, in spite of encouraging reports from the regional town of Bourke, New South Wales, is the only state in Australia not yet supporting the concept of Justice Reinvestment.[126]

VI Jurisdictional Scope

The scope of the Koori Court is confined to Indigenous offenders who have elected to have their case heard in the alternative sentencing court.[127] Offenders must plead guilty and meet certain criteria before they are eligible, for example they must be of Aboriginal or Torres Strait Islander heritage. The scope of a court's authority to decide matters may also be limited by geographical factors, such as the offender must live within or be charged with an offence within the boundary area of a local Koori Court.[128] Offenders must take responsibility for their actions by explicitly acknowledging their role in the criminal act, although they do have the right to remain silent. In cases where the offender remains silent, their legal representative will act on their behalf. There are limitations in the types of cases

[125] Paper presented by Magistrate Popovic at the AIJA Indigenous Justice conference held in Adelaide, July 2013. Magistrate Popovic drew attention to the current 'shameful' incarceration rates and commented that she is now seeing fourth generation Indigenous offenders with foetal alcohol syndrome.
[126] The Maranguka Initiative, Bourke, New South Wales. https://justicereinvestment.net.au/community-profiles/bourke-new-south-wales.
[127] The Court tends to adopt the term "accused" but in this thesis, the term "offender" is the preferred terminology.
[128] The boundaries of the courts have recently changed, effective 4 November 2013. See <http://www.magistratescourt.vic.gov.au/news/court-update-boundary-changes-effective-4-november-2013>.

heard in the Koori Court. They must not involve a breach of family violence orders or sexual assault.[129]

One of the main tenets of the Koori Court is the participation of Indigenous Elders and Respected Persons from the local community in administration of the law.[130] The Elders (called Aunty or Uncle as a cultural sign of respect) bring cultural knowledge and an Indigenous language style to proceedings. Prior to the commencement of each Koori Court, Elders are selected after consultation between the court and local senior Aboriginal people. They undertake a training course which includes procedural matters, relevant legislation and their responsibilities at the court hearing.[131]

The Magistrates' Koori Court may hear between five and ten cases in a day (in the County Koori Court this may be much less, depending on the seriousness of the charges).[132] This is in contrast to the conventional court, which hears around 50-60 matters in a day, and has tighter time constraints due to the huge number of cases heard each day.[133]

The types of sentences a Magistrate may determine in the Magistrates' Koori Court range from breaches of court orders, failure to appear in court, driving while disqualified, using an unregistered vehicle, theft, breaking and entering, possessing controlled weapons, drunken and aggressive behaviour, and alcohol and drug problems. The court has jurisdiction to hear cases involving amounts up to $100,000.[134]

Magistrate Jelena Popovic has pointed out that there are some 'unintended consequences' of traditional or mainstream sentencing outcomes which may contribute to breaches of

[129] *Magistrates' Court (Koori Court)* Act, 2002, s.6 4F (1) (b) (i), (ii).
[130] Ibid, s.2. 1(b).
[131] Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' court (Koori Court) Act 2002' (2003). Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003, 10.
[132] Harris, M, "*A Sentencing Conversation" Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* (2006) Department of Justice, Melbourne, 32.
[133] Ibid.,
[134] Magistrates' Court of Victoria Annual Report 2011-12, 35.

court orders and failures to appear.[135] One example in the Koori community is where an accused person's licence might be suspended for a driving offence in a country area, but the person may have an urgent need to travel from point A to point B, so continues to drive and thus may be charged again, leading to a cumulatively increased sentence. Another example is when a person does not turn up to the hearing due to an obligation to attend a funeral to pay respect to a community member. In the Indigenous community, attending 'sorry business' is a cultural and familial obligation, which might override the sense of obligation to attend court proceedings.[136] In a conventional court there may be a lack of cultural understanding specific to Koori offenders and this may result in a 'failure to appear'. In the Koori Court, time is taken to hear the offender's story and take into consideration any cultural context or misunderstandings.

The County Koori Court has jurisdiction to hear more serious indictable criminal offences involving amounts over $100,000.[137] The types of cases heard in this court are aggravated burglary, assault, recklessly endangering life, intentionally causing serious injury, affray, armed/attempted armed robbery, theft and breaches of community-based orders.[138]

The Koori Court follows the same laws as applied in the conventional court, but differs in the scope of the court hearing process. Traditional practices of the adversarial conventional court focus on punishing or treating the offender, who is a passive participant in the dock, speaking through their lawyer. The victim is represented by the state. If the offender is Indigenous, there is no cultural involvement by a member of the Indigenous community. In the Koori Court, the time taken for a 'sentencing conversation' between the participants may reveal underlying factors which the Judge or Magistrate may take into consideration when deciding on a fair sentence.[139]

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[135] Popovic, J, paper delivered at AIJA Indigenous Justice Conference paper, Adelaide, July 2013.
[136] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 58.
[137] County Koori Court Annual Report 2010 – 2011.
[138] County Koori Court 'Final Evaluation Report 27th September 2011' (2011) Clear Horizon Consulting,12.
[139] Daly, K, 'Revisiting the Relationship between Retributive and Restorative Justice' (2000) In Strang, H, and Braithwaite, J, (eds) *Restorative Justice: Philosophy to Practice,* 36-37.

The main aim of the Koori Court is to achieve an appropriate sentencing outcome for the offender that is an alternative to prison. The participation of the victim at the 'sentencing conversation' is therefore outside the scope of the court. However, victims are welcome to attend the court or submit an impact statement prior to the hearing and this will be taken into consideration by the Magistrate or Judge.[140]

The sentencing options of the Koori Court thus allow greater scope for a restorative and therapeutic outcome for an offender who has met the criteria to have their case heard in the court, and who has taken responsibility for their actions and agreed to cease reoffending.[141]

VII Operation of the Koori Court

Traditionally, courts are framed in a formalistic and hierarchical manner, both in physical layout and linguistic discourse between participants.[142] We are familiar with the conventional setting, where the judge or magistrate sits at the high bench, with legal professionals at a table and the accused in the dock. However, Koori Courts are unique and different to conventional courts in both process and practice. In the culturally appropriate informal design of the courtroom, all participants including the Judge or Magistrate, Indigenous Elders and the accused are seated around the oval table for the 'sentencing conversation' and this is integral to the process.[143] The interactive participation around the table gives a different perspective of the law in action. The accused is able to tell their story and the Elders contribute cultural knowledge and bring respect to proceedings. Hearings in the Koori Court are conducted in an informal manner, as mandated in the relevant Acts.[144]

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[140] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012), in Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 119.
[141] *The Magistrates (Koori Court) Act,* 2002.
[142] Ibid, 117.
[143] Ibid, 118.
[144] *Magistrates' Court (Koori Court) Act* 2002, s.6. 6.4D (4); *County Court Amendment (Koori Court) Act* 2008, at s.6. 6. 4A (5).

A Layout of the courts

Each Koori Court is established within the existing court complex but architecturally designed in a manner culturally acceptable to the Indigenous community.[145] All interiors are similar in layout, and existing courtrooms are used with cultural modifications to make the environment less intimidating. A typical example is the Magistrates' Koori Court in Shepparton, which is a well-designed modern court, with Indigenous art on the walls, and the medium size room is dominated by an oval shaped table in the centre. Three flags, the Australian, Aboriginal and Torres Strait Islander flags stand together on poles at the front of the court.[146] A traditional smoking ceremony is held prior to the first hearing conducted in the court.[147]

Figure 3: Interior of the Koori Court, Shepparton

Photograph by Simon Greig. Reproduced with the permission of the Law Institute Journal Vol 79 No 5 Page 41.

[145] Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' court (Koori Court) Act 2002' (2003) Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003, 11.
[146] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), (3) *Australia Law Librarian*, 186.
[147] The traditional smoking ceremony conducted prior to the first sitting of each Koori Court has a special significance to Aboriginal people. It is a process of cleansing and preparing the court.

Participants in the Koori Court sit around a large oval table in the body of the court. The Magistrate or Judge is seated at the table, facing front, with the Respected Person or Community Elder on either side. To the left of the Elder is the Corrections Officer, then the Police Prosecutor, the defending lawyer, the defendant, then on their left, family members and/or support person, and on their left the Koori Court Officer, completing the full circle. The defendant sits directly across the table from both the Magistrate and the Elders. Support agency representatives and additional family members or public are seated around the courtroom but close to participants at the table.[148]

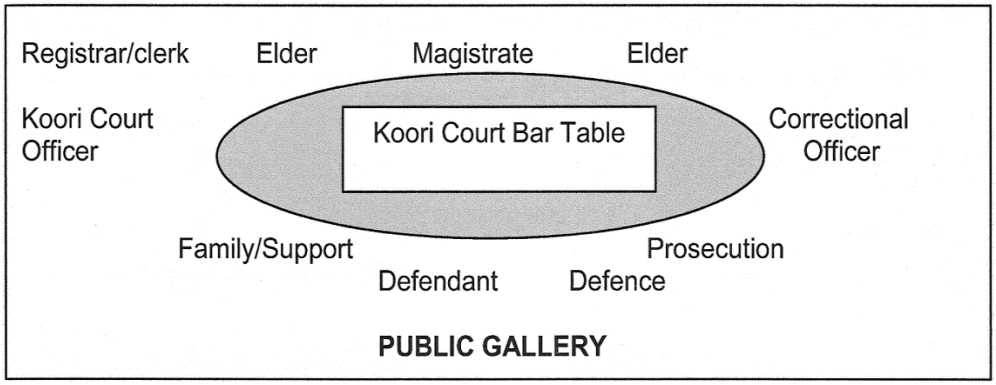

Fig. 4 Seating plan of the Magistrates' Koori Court[149]

This differs from the conventional court, which is formalistic in layout, with the raised judicial bench a marker of power and prestige, counsel at the bar table and defendant in the dock with security guards. In the conventional Magistrates' Court, wigs and robes have been dispensed with at most hearings, however other formalities remain, such as all stand when the Magistrate enters or leaves the court.[150] Family members of the defendant and the public remain at the back of the court and are not included in the process.

[148] Stroud, N., 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006) In Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, 6.
[149] Seating Plan of the Koori Court, in the Operational Manual for the Broadmeadows Koori Court, 2005, 6.
[150] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference,

In the County Koori Court in regional Morwell, the courtroom is dominated by a large elliptical table, itself a work of sculptural art and an example of Koori communities working together; the 10,000 year old ancient red gum timber was brought from Yorta Yorta country in northern Victoria and crafted with care in the Ganai-Kurnai country in Eastern Victoria, for use in the Morwell County Koori Court.[151] During Stage Two of the sentencing process, the Judge and all participants are seated around this table with the Indigenous Elder and Respected Person seated either side of the Judge. The offender sits with a family member or support person directly opposite the Judge and Indigenous community Elders. The Defence Lawyer, Prosecuting Lawyer, Koori Court Officer and Corrections Officer complete the full circle. Family and friends are seated close by in the public area of the court.

Again, this is in contrast to the conventional County Court, where the Judge and legal professionals are attired in wigs and gowns throughout the whole process, and the uniformed Tipstaff in charge of court proceedings and police presence all complete a rather intimidating picture for a person unfamiliar with the legal domain.[152]

B Process and practice of the Koori Court

As previously mentioned, all courts are "smoked" in accordance with Aboriginal custom prior to the first sitting of the court. At the start of all hearings, the Magistrate or Judge pays respect to the original inhabitants of the land on which the court stands, also Elders past and present, which is consistent with Indigenous cultural protocols at the start of formal proceedings.

2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 117.

[151] The story of the crafting of the County Court table is found in the article 'The Pursuit of Usable Beauty – Damien Write and his table' by Gideon Haigh, in *The Monthly*, 44, April 2009, 43.

[152] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 117.

The Magistrates' Koori Court is less formal than mainstream courts, with the Magistrate and all participants seated around the table, and family and support persons seated close by. In keeping with the informal process of the court, the Magistrate greets the offender by their first name, and introduces them to all participants. Elders not only give their name, but also their family group on country.[153] The Elders bring respect and cultural knowledge to proceedings.[154] As the location of the court sits within the local Indigenous community, the offender is often known to the Elders and many others in the courtroom. The seating of the Elders directly across from the offender during the 'sentencing conversation' can be quite confronting to the offender, who is often reduced to tears with the shame of how they have let down their family and community.[155]

In the Magistrates' Koori Court, most Court formalities are dispensed with. Those present do not stand and bow when the Magistrate enters or leaves the court as in other courts. However, respect and politeness are still very much in evidence in Koori Court proceedings.

The offender is encouraged to bring members of their family to the court hearing. In fact it is unusual for them not to have a family member seated beside them, or with others in the body of the court. Babies and children are sometimes close by. Koori Courts are open courts, and members of the public may be present as observers.[156] Any person in the body of the court may contribute to the conversation at an appropriate point.

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[153] For example, the Elder may say 'my name is Aunty B and I am Yorta Yorta'. Sometimes they may add further details of their family group, for example if they were displaced from their land or part of the Stolen Generation. This historical knowledge identifies their cultural background and heritage.

[154] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), (3) *Australia Law Librarian*, 190.

[155] Marchetti and Daly note that some scholars consider 'shaming' and healing elements of Indigenous sentencing courts are similar to elements of restorative justice conferences (see Marchetti, E and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007), 29 *Sydney Law Review*, 428. Others such as Freiberg, A, 'Innovations in the court system' (2004), Paper presented at the Australian Institute of Criminology Conference, Melbourne, suggest that "Indigenous courts are not problem-solving courts, but specialist courts with problem-solving and therapeutic overtones".

[156] Stroud, N., 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006) In Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, 6.

Proceedings begin with the prosecutor reading the charges, followed by the defence lawyer responding. The Magistrate then speaks to the offender, and asks if they would like to tell their story (there is no compulsion for the offender to participate, they are merely given the opportunity and encouraged to speak if they wish). The Elders are then asked if they have anything to say to the offender, and each Elder or Respected Person takes this task very seriously. They draw on cultural and local knowledge of the offender and their family and express their disappointment at how the offender has let down their community. They then tell their own story which may have parallels with that of the offender, but they show how disadvantage may be overcome with help. The Elders encourage the offender to take responsibility for their actions and request them to change their behaviour. Participants from support services offer appropriate rehabilitation programs to the offender. The judicial officer then retires to consider the evidence and prepare the sentence. If matters are complex, the final sentence will be adjourned to a later date.

The County Koori Court differs from the Magistrates' Koori Court in that matters before the court are heard in three stages. The first stage is the formal arraignment, where the defendant enters a formal guilty plea. The Judge and legal professionals are attired in wigs and gowns with the Judge seated at the bench. The Koori Elder and Respected Person are not present. The second stage is the informal 'sentencing conversation' similar to the informal hearings conducted in the Magistrates' Koori Court. The Judge, Elders and all participants including the defendant are seated around the table in the body of the court for the hearing. The third stage is the sentence stage, usually conducted on a separate day, after deliberation of all the facts by the Judge. Proceedings are again formal, with the Judge and legal professionals returning to the courtroom in wig and gown, and the defendant hearing the verdict from the dock. The Elder and Respected Person are seated at the back of the court, in order to show that the sentence is the decision of the Judge alone.[157]

[157] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), (3) *Australia Law Librarian*, 189.

The County Koori Court is similar to the conventional County Court in both the first and third stages of the hearing, where proceedings are formal. The difference lies in the second stage, where all participants are interactive including the Judge, Elders and Respected Persons and the offender, seated around the table for the 'sentencing conversation'.[158]

C Participants

In the Koori Court, all participants are interactive in the court process, and the addition of the Indigenous Elder and Respected Person has a marked effect on both the interaction in the court process and the relationship between the justice system and the Indigenous community. The Koori Court Officer liaises with all parties involved in the hearing, and it is interesting to observe the Police Prosecutor working with the Defence Lawyer and all at the table to reach a positive outcome for the offender.[159] Other active participants are the Corrections Officer, Police Prosecutor, Defence Lawyer, defendant, family member or support services. According to Marchetti and Daly, these additional participants at the court hearing change the focus of sentencing 'to one which is more negotiated, rehabilitative or reconciliatory'.[160] This was borne out by the research conducted for this thesis.

All participants seated around the table interact in the court process and have an opportunity to contribute to the discussion.[161] Three of the main roles taken by courtroom participants illustrate the variation in practice between the adversarial conventional court and the alternative sentencing Koori Court. These are the Judicial role, the role of the Indigenous Elder or Respected Person, and the offender's role.

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[158] Ibid, 190.
[159] Observation by researcher at Magistrates' Koori Court hearing, Shepparton, 2009.
[160] Marchetti, E, and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 440.
[161] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2012. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 118.

Judicial Role

As in the conventional court, judicial officers in the alternative sentencing Koori Court must be fair, impartial, and follow the rule of law. They have the same judicial powers as those in conventional courts.[162] However the key difference is one of process; the lower number of cases heard in a day allow time to hear from all participants and address some of the underlying problems which may arise.[163] According to King, in a non-adversarial courtroom the judicial role changes from a neutral, largely uninvolved umpire seeking to ensure the fairness of a process mainly conducted by the parties, to a collaborative process and increased interaction between the judicial officer, participants, court team members and community members, informed by therapeutic jurisprudence principles.[164]

Some detractors have criticized judicial offices for being too 'soft', and label therapeutic judging as 'social work'.[165] It is clear, however, that judicial officers who apply principles of therapeutic jurisprudence in their court find that an approach that 'respects, empowers and involves the participant is more effective than a paternalistic response' [166] Selected Judges and Magistrates preside in both the Koori Court and conventional courts, resulting in a 'cross-over' of culturally aware practices.

Indigenous Elders

The participation of Elders in the Koori Court is one of the main tenets and key features of the Koori Court process.[167] Elders and Respected Persons often have personal knowledge of

[162] Ibid, 119.
[163] Harris, M, "*A Sentencing Conversation" Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* (2006) Department of Justice, Melbourne, 32.
[164] King, M. 'Judging, judicial values and judicial conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts' (2010). 19 (3) *Journal of Judicial Administration,* 133.
[165] This criticism was reported by Judge Peggy Hora at the AIJA Non-Adversarial Justice Conference in Melbourne, 2010. (Author's notes).
[166] King, M, et al, *Non-Adversarial Justice* (2009), Federation Press, 211.
[167] There is no designated role for Indigenous Elders or community members in the conventional court, although the Magistrates' Court Integrated Services Program (CISP) includes a Koori Liaison Officer to work with Koori defendants.

the offender or their family. This is especially so in regional community areas. They often share their own story to show that disadvantage can be overcome. In the busy urban Koori courts, the Elders may not know the background of the offender but still bring respect and cultural authority to proceedings, and are able to show the offender that their behaviour brings shame on the community. While expressing disappointment or even distress at the offence, the Elders offer encouragement to the defendant, with the assurance that the court can call upon the associated support services and community for further assistance if required.[168]

The Elders are also able to impart cross-cultural knowledge to the Magistrate regarding the importance of kinship obligations or practices which may be a factor in certain offences such as the breach of a court order or failure to appear in court.[169] The Elders impress on the offender that they must comply with two laws, 'white law' and Aboriginal law. This is not to say that customary law has an explicit place in the justice system; Koories not only must obey the Victoria and Australian law, but also be true to their Indigenous heritage.

The Elders' role is a vital one, and it is important that they receive support from the Court. They are held in the highest regard and have the respect of their community. The Magistrate or Judge spends time with the Elder and Respected Person prior to the hearing outlining the background of each case.

Offender

One of the main differences between the role of the offender in the conventional court and the Koori Court is in their participation and interaction in the court process. Whereas in the conventional courtroom the offender is largely silent and only speaks through their lawyer,

[168] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 120.
[169] Ibid.

in the Koori Court they are encouraged to participate and are given the time to tell their story. They have a "voice" in the court process.

The offender in the Koori Court must elect to have their sentence determined in this court. They must comply with eligibility requirements as to their Aboriginality, and must plead guilty to the offence.[170] Some Koories find that it is too confronting to sit across from an Elder of their community and prefer to remain anonymous in the conventional court[171] without the "shame" of having to take responsibility for their actions in front of their community Elders.[172]

The offender who elects to come to the Koori Court must convince the Magistrate or Judge and Elders that they accept responsibility for their actions by verbally stating that they agree to change their behaviour.[173] If one of their underlying problems is alcohol abuse, drugs or anger management, they are referred to support services and given the opportunity to enter an appropriate rehabilitation or other program. The offender may also be a victim of crime, and has inevitably suffered disadvantage in some way, and Elders of the Indigenous community have a positive impact in helping them turn their life around. The court's broad practice of restorative rather than retributive justice provides the offender an opportunity to stop offending and change their behaviour.

Other participants

[170] *Magistrates' Court (Koori Court) Act,* 2002, 4F (c) (ii).
[171] Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' Court (Koori Court) Act 2002' (2003).Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003,13. Briggs and Auty suggest the offender wants to avoid family disapproval, however at hearings attended by the researcher, it is noted that Elders, while discouraging bad behaviour, also encourage the offender to turn their life around and stop offending.
[172] Marchetti, E, and Daly ,K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review,* 448. Marchetti and Daly note that the 'the shaming element of an Indigenous Sentencing Court is similar to restorative justice practices'.
[173] Magistrates' Court Annual Report 2007-08, 56.

All participants at the 'sentencing conversation' have a role to play in arriving at a "solution-focused outcome".[174] The Koori Court officer has a paralegal and outreach role and is actively involved in gaining feedback from the local community about the operations of the court.[175] They work collaboratively with legal professionals, Indigenous community Elders, support services and the offender prior to the hearing. Apart from the previously mentioned roles of Judicial Officer, Elder and offender, other participants include the prosecutor, defence lawyer, corrections officer, support person or family member of the offender, and all are invited to sit at the table. In the body of the court are family members, friends of the accused, other Indigenous Elders of the community and the public. The key difference between a conventional court and this court is the non-adversarial approach adopted by the participants in the Koori Court.

While there is no role for the victim at the Koori Court hearing, they are welcome to attend the court and any victim impact statement is taken into account in the judicial decision.[176] The traditional role of the victim in the conventional court is dealt with in the *Victims' Charter Act* 2006, which sets out principles on how the criminal justice system and victim service agencies should respond to victims of crime.[177] The purposes of the Act are –

a) to recognise principles that govern the response to persons adversely affected by crime by investigatory agencies, prosecuting agencies and victims' services agencies; and
b) to establish requirements for the monitoring and review of the principles set out in this Act.

[174] Term coined at the National Judicial College seminar, 2010.
[175] Auty, K, and Briggs, D, 'Koori Court Victoria: Magistrates' Court (Koori Court) Act 2002', *Law Text Culture* 8, 2004. Daniel Briggs was the very first Koori Court Officer and his work essentially provided the template for the work of others which followed.
[176] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists Tenth Biennial Conference, 2011. Birmingham: Centre for Forensic Linguistics, Aston University. <http:www.forensiclinguistics.net/iafl-10-proceedings.pdf>, 119.
[177] *Victims' Charter Act* 2006 came into effect on 1 November 2006.

The Koori Court is fundamentally geared towards the sentencing process and the offender, and as such, there is only limited scope for the victim to participate in the Koori Court. In many ways, their role is much the same as in the conventional court procedure.

VIII Language

The issue of language is central to this thesis. It is considered in more detail in Chapter Four (Linguistic Dimensions) and in the penultimate chapter that considers the research findings. It is appropriate to briefly note a few key elements of the use of language in this chapter.

When an Aboriginal offender appears in the mainstream court, they often must contend with three languages, Australian English, Legal English and Aboriginal English. Any cultural and language differences between the languages may cause misunderstandings for an Aboriginal speaker, and may impact on the sentencing outcome. Diana Eades' landmark work on Aboriginal language in these courts is fundamental for the research conducted in this thesis.[178]

One of the main features of language in the Koori Court is in the interactive process of the 'sentencing conversation'.[179] The way language is used in the informal Koori Court is participative, culturally more aware, and non-adversarial. This compares with language in the conventional courtroom which uses complex legal terminology and a question/answer communicative style by antagonistic counsel, with the judicial officer largely silent. Indigenous participants in this court may 'appear' competent in the language, but cultural

[178] Eades, D, 'A case of communicative clash: Aboriginal English and the legal system' (1994). In Gibbons, J (ed), *Language and the Law*, Longman Group, 234-264. See also Eades, D, 'Aboriginal English on trial: the case for Stuart and Condren' (1995). In Eades, D (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, University of New South Wales Press, Sydney, 147-174. Eades' work is examined in more detail in Chapter 4.

[179] Briggs, D, and Auty, K, 'Koori Court, Victoria – Magistrates' Court (Koori Court) Act 2002' (2003), Paper presented at the Australian and New Zealand Society of Criminology Conference, October 2003, 12. Briggs and Auty outline the procedure for the 'sentencing conversation'; Harris, M, "*A Sentencing Conversation", Evaluation of the Koori Courts Pilot Program October 2002 – October 2004* (2006), Department of Justice, 14. Harris notes that the term 'A Sentencing Conversation' coined by Magistrate Auty, emphasizes 'the manner in which the traditional mode of operation of Magistrates' Courts has been radically transformed'.

differences may lead to a breakdown in communication between speaker and hearer and misunderstandings can occur in proceedings. The legal environment is modified in this court, and all participants including the offender, are given respect and encouraged to speak during the hearing.

Some of the specific features of language used in the Koori Court process show an awareness of cultural difference. Legalese is kept to a minimum; the importance of silence is recognised; there is language accommodation between speakers, rather than one way towards the more powerful speaker; the question/answer format is minimal; and cultural taboos which may prevent the mentioning of a deceased person's name or sacred sites are taken into account.[180]

Language is adapted away from an adversarial mode as used in a conventional court, to a less formal, story-telling mode.[181] The offender is consulted by the Magistrate or Judge as to their understanding of proceedings and given the time to tell their story.[182]

Cunneen, a leading criminologist specialising in Indigenous people,[183] refers to language complexities which may disadvantage Indigenous people in the formal legal process, such as the difficulties which partly derive from a range of cultural and communicative (verbal and non-verbal) differences which govern who can speak and when. He notes that 'the failure to understand and respect Indigenous structures and processes for interpersonal communication can lead to further 'silencing' of an Indigenous voice in the process'.[184] In

[180] Stroud, N., 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, at 3-4; Eades, D, 'Interpreting Aboriginal English in the Legal System' (1996). Paper presented at the Proper True Talk National Forum, Alice Springs, 1995, 59-60. See also Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 42-44.
[181] Eades, D, *Courtroom Talk and Neocolonial Control* (2008) Mouton de Gruyter,207-212.
[182] At one hearing attended by the researcher, the whole court waited in silence for several minutes while thoughts were collected.
[183] Cunneen C, 'Roots of Restorative Justice' (2007). In Johnstone, G, and Van Ness, D.W., (eds) *Handbook of Restorative Justice* Willan Publishing, Portland, Oregon, 117.
[184] Ibid.

the Koori Court, the interactive dialogue of all participants at the 'sentencing conversation', appears to address these concerns.

IX Evaluations of the Koori Court

There have been a number of evaluations carried out on Australian Indigenous sentencing courts over the past decade or more.[185] Of particular interest to this thesis are those evaluating the Koori Court of Victoria, but I will briefly review other evaluations of Indigenous courts as they refer to the Koori Court. One of the first to provide an overview of Indigenous courts and justice practices in Australia were criminologists Marchetti and Daly in 2004,[186] who compared the Koori Court with other Australian Indigenous courts, such as the Circle Court in New South Wales, the Murri Court in Queensland, and the Nunga Court in South Australia. Then again, in 2007, Marchetti and Daly expanded on their past evaluation of Indigenous sentencing courts. This research provided a more detailed discussion of the similarities and differences of the courts, with reference to further scholarly practices such as restorative justice and therapeutic jurisprudence that may be applied to the justice process.[187]

In his independent evaluation of two courts in the Koori Court pilot program over the period 2002-2004, leading academic on Indigenous issues, Harris, found a 'high level of support for

[185] Harris, M; 'A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program, October 2002-October 2004', (2004). Department of Justice, Victoria; Marchetti, E and Daly, K, 'Indigenous Courts and Justice Practices in Australia (2004), *Australian Institute of Criminology;* Marchetti, E and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model', (2007), 29 *Sydney Law Review*, 415; Marchetti, E, 'Delivering Justice in Indigenous Sentencing Courts: What this Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014), in *Law & Policy*, 36, 4; Borowski, A, *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria 2009* (2009), Victorian Law Foundation; County Koori Court Final Evaluation Report 2011 (2011), Department of Justice; Bennett, P *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (2016), The Federation Press; and Cunneen, C, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' (2014), in Bucerius, S and Tonry, M (eds), *The Oxford Handbook of Ethnicity, Crime and Immigration,* Oxford University Press, 396-407.
[186] Marchetti, E and Daly, K, Indigenous Courts and Justice Practices in Australia (2004), *Australian Institute of Criminology.*
[187] Marchetti, E and Daly, K, Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model, (2007), 29 *Sydney Law Review*, 415.

the Koori Court model', and that it was a 'resounding success'.[188] The Australian Government echoed this, releasing a Productivity Commission Report on 2 July 2009 on 'Overcoming Indigenous Disadvantage' which listed the Koori Court and other alternative sentencing courts as 'things that work' in overcoming Indigenous disadvantage.[189]

At this time, Harris reported a reduction in the level of recidivism of Indigenous offenders over the period evaluated, of 12.5% at Shepparton and 15.5% at Broadmeadows, compared with 29.4% over the same period for all Victorian defendants. According to Fitzgerald, however, this claim was ill-founded, as it involved an inappropriate comparison group of more serious offenders.[190] Marchetti and Daly also queried Harris' findings, noting inadequate follow-up periods and the counting of court files rather than defendants.[191] In spite of this lack of consensus, this report remains a comprehensive evaluation of the first years of the Koori Court Program, and many of Harris' 19 recommendations have since been employed.

Then in 2009, an evaluation of the Children's Koori Court was conducted by legal academic Borowski in 2009.[192] Borowski found that a goal of increased Indigenous ownership of the administration of the law resulted in an awareness of community codes of conduct, with more accountability and participation of Koori youth. The collaborative sentencing process of all participants at the Court hearing, and the engagement of Koori Elders in the sentencing process, allowed the Magistrate to make more culturally-appropriate sentencing decisions. A major factor was the increased time to hear from the defendants as they reflected on their own experiences. In spite of many positive findings, the study found that the recidivism rate

[188] Harris, M, 'A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program, October 2002-October 2004', (2004). Department of Justice, Victoria.
[189] Productivity Commission Report, 'Overcoming Indigenous Disadvantage' (2009), Australian Government.
[190] Fitzgerald, J, 'Does circle sentencing reduce Aboriginal offending?' (2008), 115 *Crime and Justice Bulletin*: Contemporary Issues in Crime and Justice, 1. (see also <https://www.bocsar.nsw.gov.au>).
[191] Marchetti, E, and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model', (2007), 29 *Sydney Law Review*, 415.
[192] Borowski, A, *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria* (2009), Victorian Law Foundation.

for Koori youth remained high, and further research over a longer period of implementation was suggested.

The County Koori Court Final Evaluation Report in 2011 found that there were many significant achievements in the Koori Court program area with the availability of a Court for Indigenous offenders in a higher jurisdiction.[193] An overview of the findings of this study considered the key strengths and challenges for Koori defendants, and how these were addressed. The report found that support services play a key role in addressing offending behaviour, and it was important for service providers to attend court hearings.[194]

Koori Elders of the Indigenous community who participated in the study noted that during the court hearing, defendants felt 'shame' for their behaviour, and were motivated and supported to address offending behaviour. The participation of the Koori community was a positive element of the court process. Although there was strong evidence that there were significant achievements in providing 'access to fair, culturally relevant and appropriate justice' for Koori offenders, the report found that it was too early to say whether the Court will have a long-term impact in the future on reoffending.[195]

In her research paper in 2014, legal academic Marchetti, further built on her earlier work and that of previous scholars who had evaluated Indigenous Sentencing courts and participants in the sentencing process.[196] She asked to what extent does delivering justice mean for participants such as Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers? Marchetti's study was undertaken over a period of six years with data

[193] Dawkins, Z, et al, *County Koori Court: Final Evaluation Report* (2011), County Court of Victoria and the Victorian Department of Justice, 49.
[194] Ibid, 5.
[195] Ibid, 4.
[196] Marchetti, E, 'Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014*) Law & Policy* Vol 36, No.4.

collected from a number of interviews conducted in three Australian jurisdictions – in New South Wales, Queensland and Australian Capital Territory.[197]

The study asked participants a number of questions on sentencing principles, procedural justice, and cultural recognition and empowerment. Although the Koori Court process was mentioned, this was not part of the original study. However, many of the responses provided by participants were relevant to my research. For example, the findings showed that by telling their stories and describing their experiences at the hearing, Elders educated other court participants in what it is like to be an Indigenous Australian.[198] The importance of Indigenous offenders understanding the court process and participants being mindful of language barriers also emerged in responses. Marchetti's study found that by integrating Indigenous cultural values, there was more respect for Western law.[199]

One marked difference between some of the responses above and the Koori Court process is the time allowed for the interactive 'sentencing conversation' of all participants at the hearing. As the Judicial Officer and Koori Elders are seated at the table directly across from the offender, all at the table including the offender have the opportunity to tell their story prior to the Judicial Officer deciding on an appropriate sentence. Communication in the Koori Court thus is seen to enhance the perception of justice for Aboriginal offenders.

Evaluations of the Koori Court reviewed in this section, reveal that this specialist court is a valuable contribution to the criminal justice process as a culturally appropriate and effective sentencing option with the aim of reducing recidivism in Indigenous offenders.

[197] Although the Koori Court of Victoria was not included in this study, the main findings of the Marchetti study were relevant to this thesis as they identify how an Indigenous Sentencing Court draws together all participants with the Indigenous community, to deliver a more appropriate outcome for a Koori defendant.
[198] Marchetti, E, Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers (2014), *Law & Policy*, 36,4.
[199] Ibid.

X Conclusion

This chapter has demonstrated important features of the Koori Court, and how broad principles of restorative and therapeutic justice as applied in this alternative specialist court appear to be more culturally appropriate as a sentencing option for Indigenous offenders than the conventional court. The new concept of justice reinvestment may be a way to address disadvantage and build up and strengthen Indigenous communities, and bring about a consequent reduction in offending, and this will be explored later in the thesis.

The collaboration between the government, courts and Indigenous community as shown in the evolution of the Victorian Aboriginal Justice Agreement furthers the objective of improving Koori relations with the justice system. In the Koori Court, the interactive process of the 'sentencing conversation' and the participation of Indigenous Elders and Respected Persons in administration of the law, appears to have a marked effect on improving communication in the courtroom. Evaluations of the Koori Court reveal that this specialist court is a valuable contribution to the criminal justice process as a culturally appropriate and effective sentencing option with the aim of reducing recidivism in Indigenous offenders.

The chapter concludes that although the Koori Court with its changes in court process and practice has shown evidence of improvement in the experience of offenders in the justice system,[200] more needs to be done in addressing the continuing disadvantage experienced by Indigenous Australians which brings them into negative contact with the law.

[200] Evaluations carried out on the Koori Magistrates' Courts in Shepparton and Broadmeadows (Harris, M, *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002- October 2004* (2006)); the Children's Koori Court (Borowski, A, *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria, 2009* (2009), Victorian Law Foundation; and the County Koori Court (Dawkins, Z, et al, (eds), *County Koori Court Final Evaluation Report*, (2011), Victorian Department of Justice; all showed evidence of improvement in the experience of offenders in the court system.

CHAPTER 4 LINGUISTIC DIMENSIONS

I Introduction

This chapter examines the linguistic dimensions of communication in the Koori Court, setting the scene for the research project, and findings. The chapter endeavours to step outside the mainstream legal process of the courtroom, and view the communicative process and interaction between Indigenous speakers and legal professionals in Victorian courts of law through a more detailed linguistic lens. The key question guiding the research is to determine if cross-cultural issues of miscommunication continue to be reflected in the court process, or if an awareness of cultural and language difference by participants in the alternative Koori Court hearing leads to better communication, with a more restorative and therapeutic outcome for both Indigenous offenders and the community and a reduction in reoffending. The term 'cross-cultural communication' (meaning communication between two distinct cultures) is the preferred term used in this interdisciplinary thesis. It is used to highlight the cultural and language differences in communication between Aboriginal Australian speakers and speakers in the legal domain.

This section briefly provides an overview of all six sections in the chapter, beginning with theoretical aspects underpinning communication in the Koori Court, such as the philosophy behind the use of language, and the way language is used in both mainstream and alternative sentencing courtrooms.[1] A discussion on the established linguistic norms of communication follows, together with an examination of the communicative process. Any divergence in accepted contemporary linguistic theory on issues of cultural difference in the courtroom context is identified. Problematic linguistic features which may contribute to miscommunication in the mainstream court are also described, together with ways in which the Koori Court addresses cultural and language difference. The section concludes by

[1] The complexity of the cross-discipline approach of the linguistic and legal examination of communication in the justice system, inevitably results in the need for repetition in both domains, which is revealed in some overlapping in Parts II and V of this chapter.

examining how changes made to courtroom discourse may enable a more overt awareness of differing linguistic features in courtroom interaction.

In Section Two, the chapter discusses the philosophy of language and the importance of understanding and meaning in effective communication. One of the main tenets of the Koori Court is the philosophy underpinning the process and practice of the court.[2] This includes court practices of restorative and therapeutic justice with the aim of achieving a solution-focused outcome for Indigenous offenders as an alternative to imprisonment.

The section then moves to an examination of cross-cultural communication, using the analysis framework of interactional sociolinguistics[3] developed by anthropologist and linguist John Gumperz,[4] who pioneered work on the culture-specific meaning in communication/miscommunication when people from differing cultural backgrounds endeavour to communicate. Gumperz and others give a perspective on miscommunication which may stem from cultural habits and assumptions. Sharifian provides us with insights on how to reduce the potential for miscommunication between Aboriginal and non-Aboriginal speakers in various settings such as the court.[5]

Section Three investigates the relationship between language and the law in the criminal justice system in Victoria. Victorian mainstream courts operate within an adversarial, common law framework, which is structured, formal and with specialised terminology used in courtroom discourse throughout proceedings. This section reviews language in the Victorian legal system in three parts. Firstly, the role of language in the formal mainstream court is examined. In this court, three 'varieties' of English may be spoken during court hearings which involve an Aboriginal speaker - Standard English, Legal English and Aboriginal English. Aboriginal English has culture-specific variations which go beyond Standard English

[2] Briggs, D and Auty, K, 'Koori Court of Victoria – Magistrates' Court (Koori Court) Act 2002' (2003). Paper presented at the Australian and New Zealand Society of Criminology Conference, Sydney, October 2003, 9.
[3] Interactional sociolinguistics is a sub-discipline of Linguistics which uses discourse analysis to study how language users create meaning via social interaction. This approach has its origins in anthropology and sociology and also conflates with ethnography of communication.
[4] Gumperz, J. *Discourse Strategies* (1982), 172-173, Cambridge University Press; also in Schiffrin, D, Tannen, D & Hamilton, H, (eds), *The Handbook of Discourse Analysis* (2003), Blackwell Publishing, 551-552.
[5] Sharifian, F, *Cultural Conceptualisations and language: Theoretical framework and applications* (2011) John Benjamins, 62.

and Legal English and may not be recognised outside the speech community. An understanding of these variations is beneficial for all legal professionals in the courtroom.

Secondly, these 'varieties' are discussed and compared in more detail. Although Indigenous speakers in most regional and urban courts in Victoria speak Standard English, miscommunication may occur when assumptions of the level of understanding are made by legal professionals without an awareness of language and cultural difference. Thirdly, courtroom discourse is examined, comparing the way language is used in the adversarial court with the less formal discourse of the alternative (non-adversarial) sentencing Koori Court. The legal domain may be intimidating for any person unfamiliar with the court system, even more so for a person from an oral-based culture of group consensus.[6] The section concludes with a discussion on the impact that changes in the role of participants in the Koori Court have on language in the legal system.

Section Four acknowledges the concerns of a number of linguistic and legal scholars[7] over the past three decades regarding the cultural and language disadvantages experienced by Indigenous Australians in the formal court context. Specific linguistic features which may be problematic for Aboriginal speakers in the mainstream courtroom are then examined, drawing on the seminal studies of linguist Diana Eades as a benchmark[8] for an analysis of

[6] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' in *Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference*, Edited by S. Tomlin, N MacLeod, R Sousa-Silva and M Coulthard, Birmingham, UK, (2012), 115-125, at <http://www.forensiclinguistics.net/iafl-10-proceedings> 116.

[7] The specific difficulties of miscommunication which have disadvantaged Aboriginal Australians in the justice system have been considered by Cooke, M, 'Aboriginal evidence in the cross-cultural courtroom ' (1995), in D Eades (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, University of New South Wales Press, 55-96; Walsh, M, 'Interactional styles in the courtroom: an example from northern Australia' (1994), in Gibbons, J, (ed) *Language and the Law*, Longman Group, 217-233; Koch, H, 'Language and communication in Aboriginal land claim hearings' (1991), in S. Romaine (ed), *Language in Australia* ,Cambridge University Press; Pauwels, et. al (eds), *Cross-cultural communication in legal settings* (1992), Language and Society Centre, National Languages and Literacy Institute of Australia, Monash University; Frieberg, A, 'Non-Adversarial Approaches to Criminal Justice' (2007), 16 *Journal of Judicial Administration* 205; and Marchetti, E and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007), 29 *Sydney Law Review* 415. All have noted the difficulties which can and do arise when communication fails in the legal or quasi-legal setting.

[8] Eades, D, 'Legal recognition of cultural differences in communication: The case of Robyn Kina' (1996) 16 *Language and Communication* 215-227; Eades, D, 'Telling and retelling your story in court: Questions, assumptions and intercultural implications' (2008), *Criminal Justice* (2) 20, 209; Eades, D, 'Language and disadvantage before the law' (2008), in Gibbons, J and Turell, M. T, (eds) *Dimensions of Forensic Linguistics*, John Benjamins Publishing Company: Eades, D, *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter.

those pragmatic features and differences in communicative style which may cause miscommunication. This is followed by measures taken by the interactive approach of the Koori Court in addressing the problem.[9]

One of the main differences in the approach of the Koori Court is in the participation of Indigenous Elders[10] and the interactive role of all participants at the 'Sentencing Conversation'.[11] It is worth noting that in Victoria some communication difficulties experienced by Koori offenders (such as an assumption by legal professionals as to their level of understanding) differ from those observed in other specialist sentencing courts throughout Australia. A discussion of this anomaly will be expanded on later in this section.

Section Five draws again on the analytical framework of Interactional Sociolinguistics as discussed in Section Two, to show how language users create meaning via social interaction, and how this relates to the Koori Court process.[12] The methodology and analysis chosen for this study highlight why some linguistic theories may need to be adapted for a clearer understanding of why miscommunication occurs in the courtroom and how this can be overcome. This qualitative approach draws on comparative law to identify similarities and differences in the communicative process in both the mainstream courtroom and the alternative sentencing Koori Court.

The theoretical principles described in this chapter are applied in this thesis using observation of courtroom interaction and discourse analysis of semi-structured interviews, together with audio-tapes of courtroom interaction, to identify the manner in which language speakers from different cultural backgrounds interact. For a better understanding

[9] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012), in Tomlin, S, MacLeod, N, Sousa-Silva, R and Coulthard, M, (eds), Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, Birmingham, UK, 115-125, <http://www.forensiclinguistics.net/iafl-10-proceedings>.
[10] Ibid.
[11] 'Sentencing Conversation' is a term coined by the inaugural Magistrate Dr. Kate Auty at the Shepparton Koori Court, to describe the informal alternative sentencing process of the Koori Court, with participants seated around the bar table in the centre of the courtroom. This term encapsulates the interactive and participative style of the Koori Court.
[12] See Tannen, D, 'Language and Culture' (2006), in Fasold, R and Linton J (eds), *An Introduction to Language and Linguistics,* Cambridge University Press, 343-372; see also Gumperz, J, 'Interactional Sociolinguistics: A Personal Perspective' in Schiffrin, D, et al, (eds) *The Handbook of Discourse Analysis* (2003) Blackwell Publishing 215- 228.

of how interaction contributes to the construction of social order in the courtroom,[13] further theoretical principles are drawn from the area of Speech Act Theory[14] (a theory developed by the philosopher John Austin[15] and later refined by John Searle),[16] and from the area of Ethnography of Communication[17] (an approach which was first established and developed by the sociologist Garfinkel).[18] Politeness principles[19] also inform the study of interaction in a cross-cultural courtroom. This range of approaches is considered essential for an optimal examination of the way language is used in the courtroom. Only an in-depth analysis of spoken language can reveal interesting patterns of speech or behaviour in cultural or language variation.

Section Six concludes the chapter by summarising established theoretical knowledge of sociolinguistic practices over the past thirty or more years, taking into account important debates in contemporary linguistics as they relate to communication in the courtroom. This section concludes that while accepted linguistic theory may provide an answer for miscommunication in some contexts, there must be a different way of analysing interaction between interlocutors who do not necessarily share the same cultural background in a context such as the courtroom.

II Theoretical aspects underpinning communication

The work of philosophers and linguists over many decades is drawn on in this chapter to examine the philosophy of language and the importance of understanding and meaning in communication. According to Allan:

[13] Heller, M, 'Discourse and Interaction' (2003) in Schiffrin D. et al (eds) *The Handbook of Discourse Analysis,* Blackwell Publishing 253.
[14] Speech Act Theory was developed by the philosopher J.L. Austin (1962), and later refined by John Searle (1969). Speech Act analysis studies the effect of utterances on the behavior of speaker and hearer.
[15] Austin, J,L, *How to Do Things With Words* (1962), Oxford University Press.
[16] Searle, J.R*., Speech Acts: An Essay in the Philosophy of Language* (1969), Cambridge University Press.
[17] Ethnomethodological principles will be discussed further in Section Two. These describe how people interact with each other and society at large (narrative talk/shared stories – creates a shared sense of place and community). See Schiffrin, D, et al (eds) *The Handbook of Discourse Analysis,* (2003), Blackwell Publishing, 641.
[18] Garfinkel, H, *Ethnomethodological studies of work* (1986), Routledge & Kegan.
[19] For additional reading, see Brown, P and Levinson, S, *Politeness: Some universals in language usage* (1987), Cambridge University Press; Culpeper, J & Haugh, M, *Pragmatics and the English Language* (2014) Palgrave MacMillan.

> A philosophy of linguistics properly includes a philosophy of language: one has to have beliefs about what language is and what languages are before one can have beliefs about the proper way to systematically analyse the structure and composition of a language.[20]

This study is situated in the lowest tier of the criminal justice system of Victoria, with an emphasis on viewing language in the legal domain in Victoria through a forensic linguistic lens.[21] It draws on and discusses contemporary theoretical concepts of communication and interaction in the court system. It examines instances of misunderstanding and miscommunication which can occur between legal professionals and Indigenous speakers, and examines the way language may be adapted when there is an awareness of cultural and language differences between participants at a court hearing. Although much has been written by legal and linguistic scholars over the past thirty years on the subject, there appears to be a gap in currently available material regarding language difficulties experienced by Indigenous offenders in the criminal justice system specifically in Victoria. I hope to fill that gap.

The role of language as a means of communication between legal professionals and non-legal participants in the courtroom is particularly relevant when examining the work of the Indigenous Koori Court.[22] A linguistic insight into the way language is used in this court, drawing on alternative court practices of restorative and therapeutic justice, may demonstrate that it is possible to achieve a solution-focused outcome for Indigenous offenders as an alternative to imprisonment.

Part A of this section now turns to examine the philosophy behind the study of language, in particular how people make sense of the world in their interaction with others.

Part B of the section goes on to discuss issues of cross-cultural communication and explore how this may be enhanced in the court system to reduce the potential for miscommunication between Aboriginal and non-Aboriginal speakers.

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[20] Allan, K. *The Western Classical Tradition in Linguistics* (2007), Equinox, 5.
[21] Forensic Linguistics broadly defined, refers to linguistic study in the legal system. See Gibbons, J and M.Teresa Turell (eds) *Dimensions of Forensic Linguistics* (2008), John Benjamins Publishing Company,1; also Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 234.
[22] As mentioned in the introduction, one of the main tenets of this court is the philosophy underpinning the process and practice of the court. See Briggs, D and Auty, K, 'Koori Court Victoria – *Magistrates' Court (Koori Court) Act* 2002'. Paper presented at the Australian and New Zealand Society of Criminology Conference, Sydney, October 2003, 9.

A *Philosophy of Language, Concepts and Interaction*

Philosopher John Searle, in his seminal essay on the 'philosophy of language',[23] makes the distinction between the philosophy of language and 'linguistic philosophy', which is concerned with particular elements of language. In using the term 'philosophy of language', Searle looks at how words relate to the world when people communicate, and how meaning and understanding occur or fail during an utterance between speaker and hearer. This concept is important in understanding the performative function in language communication when an utterance is made (a speech act) and how miscommunication may occur. According to Searle:

> The Speech Act is the basis unit of communication […] a series of analytic connections between the notion of speech acts, what the speaker means, what the sentence […] uttered means, what the speaker intends, what the hearer understands, and what the rule's governing the linguistic elements are.[24]

This is discussed more fully in Section Five of this chapter.

Insights into how language difficulties may occur between speaker and hearer are drawn from the work of a number of linguists such as Chomsky[25] who coined the term 'linguistic competence' as an abstract notion to describe the way people communicate ('competence' here refers to the underlying system of linguistic knowledge and is in contrast to linguistic performance, which addresses the way the language system is actually used in communication). Anthropologist Dell Hymes, in reaction against this distinction, developed a different model of language known as 'communicative competence' (what speakers need to know in order to communicate effectively in different social settings), and pioneered the approach of 'ethnography of communication'.[26]

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[23] Searle, John, R, *Speech Acts: an Essay in the Philosophy of Language* (1969), Cambridge University Press, 21.
[24] Ibid.
[25] Chomsky, Noam, *Aspects of the Theory of Syntax* (1965), MIT Press, Cambridge, MA. 3-4. (on linguistic competence).
[26] Hymes, Dell, 'On Communicative Competence' (1972), in Pride J.B. and Holmes, J (eds), *Sociolinguistics: selected readings*, Penguin.

Ethnography of communication[27] is an approach which grew out of the ideas of the sociologist Garfinkel[28] (also known as 'ethnomethodology'); it focuses on how people interact with each other and society at large, and promotes an understanding of how interaction contributes to the construction of social order in the courtroom.[29] Ethnomethodological principles are drawn on for this study to explain how people interact with each other and society at large, using methods such as narrative talk and shared stories which create a shared sense of place and community.[30]

John Gumperz, in his seminal studies, examined aspects of cross-cultural miscommunication, coining the term 'contextualisation cues' for the signals speakers use to interpret the meaning of what is said during discourse.[31] Cultural conventions may cause the hearer to misinterpret the intended meaning of the speaker and lead to miscommunication. Other influences which inform this study and give insights into the analysis of communication in the Koori Court, are the works of Fairclough,[32] who first developed a three-dimensional framework for studying discourse, and sociologist Goffman,[33] who was concerned with discovery of the social order through patterns.[34]

This study also draws on the insights of Garfinkel,[35] who showed it was possible to uncover the normative order of interaction by breaching conversational routines and undermining the interlocutor's sense of shared reality. As an example of this, the interaction between

[27] Ethnomethodological principles will be explained further in Section Two. See Schiffrin, D, et al (2003) 641.
[28] Garfinkel, H, *Ethnomethodological studies of work* (1986), Routledge and Kegan.
[29] Also see Heller, M 'Discourse and Interaction' (2003) in Schiffrin, D, et al, (eds) *The Handbook of Discourse Analysis* (2003) 252; see also Gumperz, J, 'Interactional Sociolinguistic' (2003) in Schiffrin, D et al, (eds) *The Handbook of Discourse Analysis*, 216.
[30] Ibid, 641.
[31] Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press; Gumperz, J, (ed), *Language and Social Identity* (1982), Cambridge University Press.
[32] Fairclough, N, *Language and power* (1989), Longman Group UK Limited.
[33] Goffman, E, *Forms of Talk* (1981), University of Pennsylvania Press.
[34] See Heller, M, 'Discourse and Interaction' (2003) in Schiffrin, D, et al, (eds) *The Handbook of Discourse Analysis,* 252.
[35] Garfinkel, H, *Studies in Ethnomethodology* (1967), Prentice-Hall; See also Goffman, E, *Forms of Talk* (1981), University of Pennsylvania Press, who showed it was possible to uncover the normative order of interactional routines by breaching those routines to identify underlying patterns of social order; (also cited in Heller. M, 'Discourse and Interaction', (2003), in Schiffrin et al, (eds), *The Handbook of Discourse Analysis*, Blackwell Publishing, 252).

participants in the Koori Court could be breached if the hearer interprets an utterance as a problem with the speaker, and responds accordingly.[36]

Olshtain and Celce-Murcia argue that 'effective communicative interaction among language users is achieved […] when there is a basic sharing of prior content and discourse knowledge'.[37] At the same time, 'there should be a matching of three types of background knowledge: prior factual or cultural knowledge; prior work or life experience and prior familiarity with the relevant discourse community'. In the Koori Court, the participation of Indigenous Elders at the sentence hearing achieves all three of these conditions.

B *Cross-cultural Communication*

There appears to be no consensus and some ambiguity among linguists in the use of the terms 'cross-cultural' and 'intercultural' when referring to communication between people of distinct cultures.[38] Scollon and Wong-Scollon comment on this ambiguity, and suggest it may stem from the greater involvement of academics and non-academic colleagues across a wider range of disciplines including anthropology and sociology.[39]

As noted in the Introduction to this chapter, 'cross-cultural communication' is the preferred term used in this interdisciplinary study, to highlight the cultural and language differences in communication between Australian Aboriginal speakers and Standard English (albeit Legal Standard English) as used by speakers in a formal court of law. Appropriately, the term 'cross-cultural communication' is also currently the preferred term used throughout the Victorian Court system, Victoria Police, Aboriginal Legal Services and other agencies.

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[36] Acknowledgement is made to Louisa Willoughby of Monash University Department of Linguistics for her assistance in providing feedback on an earlier version of this research.
[37] Olshtain, E and Celc-Murcia, M, 'Discourse Analysis and Language Teaching' (2003), in Schiffrin, D et al (eds), *The Handbook of Discourse Analysis,* 710.
[38] For further reference to ambiguity see Scollon, R and Wong Scollon S, 'Discourse and Intercultural Communication' (2003) in Schiffrin, D et al, (eds) *The Handbook of Discourse Analysis*, Blackwell Publishing, 539; also see Saville-Troike, M, *The Ethnography of Communication: An Introduction*, (3rd ed, 1986), Blackwell Publishing.
[39] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 16; (see also reference to cross-cultural communication in Brown and Levinson, *Politeness: some universals in language usage* (1987), Cambridge University Press; Cooke, M, 'Aboriginal evidence in the cross-cultural courtroom' (1995), in Eades, D (ed) *Language in Evidence : Issues Confronting Aboriginal and Multicultural Australia*, University of New South Wales Press, 55-96;. Pauwels, A, *Cross-cultural communication in legal settings* (1992), Language and Society Centre, National Languages and Literacy Institute of Australia, Monash University).

Philosopher Paul Grice, in his work on conversational implicature, maintains there are certain cooperative principles essential for successful communication.[40] Grice articulated four conversational maxims under the following categories:

1 The Maxim of Quantity. Give only as much information as is necessary (not too much or too little).
2 The Maxim of Quality. Make your contribution one that is true (do not give false information).
3 The Maximum of Relation. Be relevant to the topic (utterances should have some bearing on the context).
4 The Maximum of Manner. Be perspicuous (avoid obscurity of expression, ambiguity and unnecessary wordiness).

According to Grice, miscommunication may occur if any of these maxims are flouted.[41] This will be discussed further in Section Five of this chapter under Methodology and Analysis.

Difficulties in cross-cultural communication are best understood within the framework developed by Gumperz who gives a perspective on miscommunication which may stem from differences in habits and assumptions about how to participate in conversation.[42] This is particularly relevant to communication in the formal mainstream courtroom between legal professionals and Aboriginal speakers. Gumperz identifies the pragmatic conditions of communicative tasks which are theoretically taken to be universal, at the same time suggesting that the realizations of these tasks as social practices are culturally variable.[43] He analyses this variation from several different perspectives. Firstly, from the perspective of different cultural assumptions and what is appropriate behaviour and intentions within it. Secondly, he analyses different ways of structuring information in any communicative task. Thirdly, he looks at different ways of speaking, including using a different set of unconscious linguistic conventions (such as tone of voice) which may affect overall meaning and

[40] Grice, H.P, *Studies in the Way of Words,* (1989), Harvard University Press, Cambridge MA, 24-40; see also reference to presuppositions and conversational implicature, 269-282; Grice, H, 'Logic and Conversation' (2010), In Jaworski and Coupland (eds), *The Discourse Reader* (2nd Ed), Routledge, 66. Note Grice's earlier work on Logic and Conversation (1967) was a collection of his Harvard University lectures.
[41] Ibid.
[42] Gumperz, J, 'Interactional Sociolinguistics: a Personal Perspective' (2003), in Schiffrin, D et.al (eds), *The Handbook of Discourse Analysis,* Blackwell Publishing, 216; Gumperz, J, *Discourse Strategies,* (1982), Cambridge University Press, 172-173.
[43] Gumperz, J and Cook-Gumperz, J, 'Introduction: Language and the communication of social identity' (1982), in Gumperz, J (ed), *Language and Social Identity,* Cambridge University Press, 12.

attitudes. In the Koori Court, the judicial officer is mindful of the different conventions and assumptions which may affect meaning and attitude between speakers, and resolves any inconsistencies. The presence of Indigenous Elders is also paramount to proceedings, as this brings respect and cultural knowledge to the discourse.

Culpeper and Haugh note that a difference in the socio-cultural view of politeness between speakers is a factor which may cause miscommunication in a cross-cultural context.[44] Their work elaborates on classic politeness theories, such as Gricean conversational implicatures, Speech Act theory, and also Brown and Levinson's work on politeness. All of these approaches are considered in the context of cross-cultural communication in the courtroom, and are expanded upon in Section Four.

It was Brown and Levinson's early work that really put politeness concerns at the forefront of research into the working of communication and social and interpersonal interaction.[45] Their theory accepts that different attitudes and values can be accounted for in their theory of politeness and the cultural notions of what they term positive and negative 'face' in interaction; here 'face' refers to the need people have to be well regarded (as in, for example, figures of speech such as 'to lose face' and 'to save face'). Their approach is that in any particular society, despite rich cultural elaborations, the core ideas of politeness have a striking familiarity, and hence politeness can be explained within a universal theoretical framework across cultures. They maintain that linguistic cues of some social variables such as power and control, gender differences and cross-cultural interaction, do not undermine their theory.[46]

Wierzbicka supports the above view that there is a need for a universal perspective on meaning which is culture-independent, but at the same time maintains that there must be understanding of culture-specific aspects of meaning in communication.[47]

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[44] Culpeper, J & Haugh, M, *Pragmatics and the English Language* (2014), Palgrave Macmillan,199-202.
[45] Brown, P and Levinson, S, *Politeness: some universals in language usage* (1987), Cambridge University Press 13.
[46] Ibid.
[47] Wierzbicka, A, *Cross-Cultural Pragmatics: The Semantics of Human Interaction* (2003) (2nd ed), Mouton de Gruyter, 9.

Context is an important factor when a difference of meaning occurs during communication at a courtroom hearing, as a lack of cultural awareness by the court can impact on the judicial process for a less powerful person from a disadvantaged background. This thesis also considers how contemporary linguistic theories may be applicable, in particular how they may help to offer insights into communication between Aboriginal speakers and legal professionals in the courtroom context - in other words, what works for successful communication at the court hearing and what does not?

This study examines the culture-specific meaning in communication/miscommunication in the courtroom between speakers with a background of differing values and expectations. It also draws additionally on the framework of Fairclough[48] for studying discourse in relation to discursive events and socio-cultural practice, and makes reference to ethnography of communication[49] in which Hymes links linguistics with anthropology and sociology.

The language used in the Victorian legal process in the mainstream court is not interactive for an Indigenous offender, and may be difficult to understand for someone used to a different way of communicating. Thus, there may be cultural and linguistic disadvantage for a person with different expectations of communication. In his work on cultural conceptualisations, Sharifian suggests that a micro-analysis of courtroom discourse should give an insight into how assumptions and expectations occur between speakers when an awareness of cultural difference is not present. [50] He provides insights to reduce the potential for miscommunication between Aboriginal and non-Aboriginal speakers in various settings such as the court.[51] Examples of successful interaction that may occur between participants at court hearings in the Koori Court, may be found in my findings in Chapters 6 and 7 of the thesis.

III Language in the Legal System

[48] Fairclough, N, *Language and Power* (1989), Longman Group, 47-48.
[49] Hymes, Dell, 'On Communicative Competence' (1972), in Pride, J.B. and Holmes, J (eds), *Sociolinguistics: selected readings*, Penguin.
[50] Sharifian, F, *Cultural Conceptualisations and language: Theoretical framework and applications* (2011), John Benjamins Publishing Company.
[51] Sharifian, F, *Cultural Conceptualisations and language: Theoretical framework and applications* (2011), John Benjamins Publishing Company,62.

Mainstream criminal courts of law operate in Victoria within an adversarial, common law framework, maintaining observance of the rule of law, but not always operating with sufficient consideration of underlying cultural or social factors.[52] The language used in an adversarial mainstream court is formal and precise, and necessarily highly dependent on the communicative goals of its users.[53]

Eades argues that

> It is impossible to address language and disadvantage in the law […] without an understanding of the politics of disadvantage, and the rights of people whose difference from the dominant society plays a significant role in their participation in the legal process[54]

Eades is best recognised for her work explaining the misuse and misunderstanding of Aboriginal English in the legal and court processes. Her research on gratuitous concurrence, shame, and silence in Aboriginal culture has informed criminal justice processes profoundly.[55]

In contrast to the formal mainstream court, the alternative sentencing Koori Court has emerged as a culturally sensitive forum for Koories, and one which addresses the cultural and language disadvantage experienced by Aboriginal offenders in the mainstream court.[56] Although this court follows the same sentencing practices as the mainstream court, it provides a less formal and more participative process in the administration of the law, consistent with the Eades approach to understanding Aboriginal English.

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[52] Stroud , N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) , in Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, S. Tomlin, N MacLeod, R Sousa-Silva and M Coulthard, (eds), Birmingham, UK, 115-125,at <http://www.forensiclinguistics.net/iafl-10-proceeding>s. 116.

[53] Tiersma, P, 'The nature of legal language' (2008), in Gibbons, J and M. T. Turell, (eds), *Dimensions of Forensic Linguistics,* John Benjamins Publishing Company, 24.

[54] Eades, D, 'Language and disadvantage before the law' (2008), in Gibbons, J and M.T. Turrell, (eds), *Dimensions of Forensic Linguistics*, John Benjamins Publishing Company, 179.

[55] Eades, D, *Aboriginal English and the law: communicating with Aboriginal English speaking clients: a handbook for legal practitioners* (1992), Queensland Law Society; See also Eades, D, 'Interpreting Aboriginal English in the legal system'. Report of Proper True Talk Forum: Towards a National Strategy for Interpreting in Aboriginal and Torres Strait Islander Languages (1996), Commonwealth Attorney-General's Department, Canberra, 57-68.

[56] Following the Royal Commission into Deaths in Custody (1991), Indigenous Sentencing Courts were initiated throughout Australia, including the Nunga Court in South Australia, Koori Court in Victoria, Circle Sentencing Court in New South Wales and the Murri Court in Queensland. The Koori Court is similar to other Indigenous sentencing courts, but unique in a number of ways, for example Indigenous community Elders participate in the administration of the law, but the Judicial Officer alone decides on the sentence.

A *Role of Language in the Legal System*

The role of language in the legal system is to communicate knowledge of the legal process and to enact legislation on the rights and obligations of citizens, as well as to bring to account behaviour which goes against society's norms. The 19th Century legal philosopher Jeremy Bentham considered that 'laws are not linguistic acts, or even communicative acts. They are standards of behaviour that can be communicated (and may be made) by using language'.[57] Leading modern forensic linguistics expert, Gibbons, departs from Bentham's position, stating that

> law is the most linguistic of institutions, with the processes of the law such as police investigations and courtroom procedures overwhelmingly linguistic in nature[58]

Language in the legal system is well recognised as especially difficult for vulnerable minority groups to understand. Tiersma reviews the work of linguists who write about the various discursive strategies used by lawyers in the courtroom to control the process and attempt to shape the outcome of legal proceedings.[59] He observes that it is 'the more vulnerable and less educated members of society who are most likely to be manipulated by the communicative practices of lawyers'. This is where the interactive process of the Koori Court addresses the possible manipulation of discourse, as it allows the time and opportunity for the Koori offender to have a 'voice' in proceedings.

The role of power in the formal mainstream courtroom is also an important factor. Eades refers to pragmatic factors which contribute to misunderstanding between participants in the legal domain, such as a power imbalance and social inequality.[60] For example, in a formal court, with the Magistrate seated high at the bench, and legal professionals in formal attire, there is a marked social distance between all in the court and the accused in the dock. The language used is formal, with the Magistrate addressed as 'Your Honour', and legal proceedings carried out without explanation. In comparison, the Koori Court attempts to be more culturally sensitive, allowing the Aboriginal offender time to understand the required

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[57] Refer to <www.plato.stanford.edu/entries/law-language> first published Dec 5 2002, substantive revision Aug 9 2010.
[58] Gibbons, J, *Forensic Linguistics: An Introduction to Language in the Justice System* (2003), Blackwell Publishing, 1.
[59] Tiersma, P 'The nature of legal language' (2008), in Gibbons and Turrell (eds) *Dimensions of Forensic Linguistics,* John Benjamins Publishing Company, 23.
[60] See Eades, D, *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter, 8-9.

standard of behaviour expected by both the Indigenous community and the justice system. In this court, all participants at the hearing are given respect and the time to speak.

The use of language in the legal domain means much more than simply legal reasoning and legal interpretation alone; it also involves communication of standards of behaviour as upheld in the court for the benefit of both individuals and society as a whole.[61] Marchetti and Daly note that Indigenous courts 'emphasise the need for more effective forms of communication in relating to and helping offenders desist from crime and reintegrate into a community'.[62]

B *Standard English / Legal English / Aboriginal English*

There are some fundamentals of communication with Aboriginal Australians, which are often overlooked or misunderstood. There are at least three 'varieties' of English spoken during a court hearing which involves an Aboriginal speaker – Standard English, Legal English and Aboriginal English. The linguistic position regarding varieties of English (such as Aboriginal English) is that nonstandard does not equal substandard. For instance, as Eades argues, Aboriginal English is not linguistically inferior to Standard English, but is another variety of English which should be recognised.[63] All dialects have rules; they just do things differently. A sentence like '*I don't want nothin' to eat'* are not errors of English, but rather errors of Standard English; however, to a chauvinistic speaker of the standard, it may appear as if someone who utters these words is an incompetent speaker of the language.

In Eades' studies of the 1995 Queensland Pinkenba Case,[64] she discusses in depth the similarities and differences between Standard English and Aboriginal English, particularly as reflected in the legal domain. She defines Aboriginal English as the name given to dialects of English which are spoken by Aboriginal people.[65] In Victoria, most urban Aboriginal Australians speak Standard English, and this may lead to the assumption that they

[61] Marchetti, E, and Daly, K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007), 29 *Sydney Law Review*, 423.
[62] Ibid.
[63] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 2-5.
[64] For a full reference to the cross-examination by lawyers of three Aboriginal English-speaking boys in the Queensland Pinkenba Case (Crawford v Venardos & Ors 1995 Unreported Brisbane Magistrates' Court, 24 February), see Eades, D, *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter, Parts II and III, 91-263. In these sections Eades analyses in depth language use and communicative style of courtroom talk, in particular Aboriginal English.
[65] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 1.

understand everything that is said in the legal environment. However Aboriginal ways of using English may be influenced by a number of factors, not least being a rich cultural heritage with its own beliefs, assumptions, values and expectations when used in interaction with others.[66]

When Aboriginal offenders come to court, they then have to contend with another variety of language, legal English, which differs in lexicon and has a technical vocabulary which sometimes has both a legal and ordinary meaning.[67] In addition to this, lawyers sometimes use informal legal jargon which is understood only by the legal 'in-group'. This can be counter-productive and result in misunderstandings for the Aboriginal offender. Tiersma recommends a close examination of the language of the legal profession to determine which features serve a legitimate function and which are more problematic.[68] He suggests this examination will enable better communication among professionals working within the legal system, but also impact upon others whose lives and fortunes are governed by that system. The Koori Court allows this close examination and adaption of the language used in the courtroom.

The Koori Court deliberately adopts less formal, culturally sensitive forms of language, with the aim of improving communication and thus sentencing outcomes for Indigenous Australians. Koori offenders must plead guilty to the offence to have their case heard in this court. They are encouraged to be interactive in the court process, with greater time taken to ensure understanding, and they are given the opportunity to speak (rather than through their lawyer as in the mainstream court).[69] The participation of Koori Elders ensures that Indigenous speaking styles are adopted appropriately. Although grammatically similar to Standard English, pragmatic features in their discourse reveal a cultural difference in the way Koori Elders communicate, and this enables better communication with the accused during

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[66] Ibid, 2.
[66] Eades, D, *Courtroom Talk and Neocolonial Control,* (2008), Mouton de Gruyter, 5.
[67] An example of this is a comment made by one of the Koori Elders, who observed 'depending on the Magistrate – some of them talk legal legal legal, not breaking it down into a language, (a) layman's language, that people can actually understand'. (Transcript T4.35 (E)).
[68] Tiersma, P, 'The nature of legal language' (2008), in Gibbons, J and M.T. Turell (eds), *Dimensions of Forensic Linguistics*, John Benjamins Publishing Company, 24.
[69] A more comprehensive description of the Koori Court is found in Chapter Three of this thesis entitled 'Koori Court – Law and Context'.

the hearing. An example of this is the background knowledge the Elders bring to the discussion from a shared cultural history and the recognition of different norms and cultural expectations in the way the world is viewed.

Many of the language differences occurring in the courtroom are subtle. They may involve regional and socio-economic variation in the language spoken, for example there may be lexico-semantic variations in speech used in regional courts (i.e. differences in vocabulary and shifts in meaning). This is where the Koori Elders assist communication, with their wide network of Aboriginal knowledge and naming throughout the state. For successful communication to take place, participants in the courtroom must contend with Standard English, Legal English and Aboriginal English. It is important that those in the legal profession acknowledge these three varieties of English spoken at hearings involving Aboriginal offenders.[70]

C *Courtroom Discourse – Adversarial versus Alternative Sentencing*

As earlier described, courtroom discourse in an adversarial court is usually formal, structured and legalistic, and this is well recognised as daunting for many Aboriginal offenders who may be used to an oral-based culture of group consensus (although of course this is not always true for all). By comparison, in the alternative (non-adversarial) Indigenous sentencing court, all participants are interactive at the bar table, and the discourse process is built on notions of cooperation rather than conflict.[71]

The study examines how language is adapted to the linguistic challenges of a formal conventional court so that there is an understanding of proceedings for a non-legal participant, in particular, the Aboriginal defendant.[72] In this study, features of courtroom discourse in the mainstream adversarial court are compared with the culturally aware discursive style of the alternative sentencing Koori Court, to investigate how differences in communication may impact on understanding for the Koori offender. Gumperz and Cook-

[70] In the context of the legal courtroom, there may be some participants with bicultural ability. This means that a person has the ability to participate in two or more sociocultural groups, in this case, the interaction between Aboriginal and non-Aboriginal participants in the Koori Court (see also Ch 7, p29).
[71] King, M, et al *Non-Adversarial Justice* (2009), The Federation Press, 15.
[72] Stroud, N, 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, at <www.als.asn.au/proceedings/als2005/stroud-koori.pdf>.

Gumperz commented that there are often radical differences as to expectations and rights in any culturally variable communicative interaction. There may be different cultural assumptions, different ways of structuring information and different ways of speaking, all of which may result in miscommunication.[73] This is taken into account when analysing courtroom discourse in Victorian Courts.

Eades notes that language used in the formal courtroom often has a multi-layered dimension.[74] There are constraints on who may talk at a given time and how and when the addressee may answer. In a mainstream court, the defendant relies on their lawyer to state their case. The legal counsel dominate the discourse, and there is little allowance for story-telling by the accused. As mentioned previously, the use of complex legal terminology and possible manipulation of language by some lawyers is a frequent cause for misunderstandings and confusion for a defendant.[75]

The layout of the formal courtroom emphasises the formality of the discourse, with the Judicial Officer controlling proceedings from the raised bench. The defendant sits alone in the dock and is mostly silent. Interaction is conducted formally between the prosecutor, defence lawyer and Magistrate or Judge. Michael King observes there is a marked difference in the way the Judicial Officer interprets and applies the law to the facts in the mainstream court compared with an Indigenous sentencing court process.[76] This difference is exemplified in the Koori Court where there is time for the Judicial Officer, who is seated in the body of the court with the defendant, Koori Elders and other court participants, to hear the defendant's story without constraints in communication, prior to passing an appropriate sentence.

[73] Gumperz, J and Cook-Gumperz, J, 'Introduction: language and the communication of social identity', (1982), in Gumperz (ed), *Language and Social Identity,* Cambridge University press, Cambridge, 12.
[74] Eades, D, *Sociolinguistics and the Legal Process* (2010), 31-33.
[75] Stroud, N, 'Non-adversarial Justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) in Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, edited by S. Tomlin, N. MacLeod, R, Sousa-Silva and M Coultard, Birmingham, UK, 115-125, 21.
[76] King, M, 'Judging, judicial values and juridical conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts' (2010), 19 *Journal of Judicial Administration*, 133.

The role of participants in this court has changed to a less formal, more interactive, participative and collaborative role. All participants are seated around the table in the body of the court for the informal 'Sentencing Conversation', where time is allowed for all to speak and the importance of story-telling is recognised. The offender now has a 'voice' and can tell their story in their own words and in their own way. The participation of local community Elders, who tell their own story and how they overcame disadvantage, is effective as a deterrent for reoffending. With improved communication, the Judicial Officer is then able to determine the appropriate sentence with consideration to underlying cultural and social factors.

IV Problematic Linguistic Features Addressed by the Koori Court

As mentioned in Section One, difficulties for Aboriginal speakers in legal settings have been recorded and analysed in depth by both linguistic and legal scholars over recent decades. However, in spite of increased theoretical knowledge concerning language difficulties experienced in the courtroom context, and in spite of measures taken by government agencies, courts and other bodies to address disadvantage for Indigenous people in the justice system, there remains a high percentage of Aboriginal Australians in the prison system. The answer may be found in the culturally sensitive Indigenous courtroom, where miscommunication may be addressed, where the offender has a voice, and where the aim of the court is to rehabilitate, change behaviour and achieve a solution-focused outcome to break the cycle of offending.

As mentioned previously in Section Three, in her work on the Pinkenba case, Eades identifies some problematic features of language which cause miscommunication.[77] Preliminary observations by this writer at court hearings over the past ten years support many of Eades' findings.[78]

[77] Eades, D, *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter, 8-9; see also *Crawford v Venardos & Ors* 1995 Unreported, Brisbane Magistrates' Court, 24 February.

[78] Stroud, N, Stroud, N, 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, at <www.als.asn.au/proceedings/als2005/stroud-koori.pdf>; Stroud, N, 'The Koori

This thesis uses Eades' classifications as a benchmark, noting where similar linguistic features are found in discourse at hearings in Victorian mainstream courts and where others continue to be problematic for Koori offenders.[79] Where some features diverge from Eades' findings, these regional differences are examined and discussed, for example cultural differences and language competence assumptions that appear to be more prevalent in courtroom discourse in Victoria.[80]

In identifying the barriers to communication in the courtroom, this thesis addresses how people make sense out of language given the context in which they hear (or read it) and the knowledge they have about each other and about the world and how it works. So it takes in both pragmatic and communicative aspects (acknowledging there is some overlap here).

Part A of this section discusses the pragmatic features which may cause miscommunication in the formal court context, with examples of how the Koori Court addresses these difficulties. This is then followed by Part B which examines communication difficulties which arise for Indigenous speakers in the mainstream courtroom and how these may be ameliorated.

A *Pragmatic Features*

Pragmatic features found to be problematic in discourse in the formal court context as identified by Eades and others in studies over several decades, are included here where relevant to the Victorian court system.[81] Some of these have been touched on in earlier sections. They include:

Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), in *Australian Law Librarian,* 18 (3) 184-192; and Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011), in Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, Edited by S. Tomlin, N MacLeod, R Sousa-Silva and M Coulthard, Birmingham, UK, 115-125.at <http://www.forensiclinguistics.net/iafl-10-proceedings>.

[79] Eades, D, *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter, 8-9.

[80] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), In *Australian Law Librarian,* 18 (3) (2010),185.

[81] See Eades, D, 'A case of communicative clash: Aboriginal English and the legal system' (1994), in Gibbons, J, (ed), *Language and the Law*, Longman Group, 234-264; see also Eades, D, 'Aboriginal English on trial: the case for Stuart and Condren' (1995), in Eades, D, (ed) *Language in Evidence: Issues Confronting Aboriginal and*

1. formality of the mainstream court, with its markers of power and prestige which may cause a power imbalance
2. cultural and language assumptions of competence, politeness norms or expectations
3. non-verbal communication, for example a different interpretation of the use of silence, a lowered gaze, culturally specific gestures in body language such as a shrug or negative attitude, or differences in ideology[82]

1 *Formality*

The formality of the mainstream courtroom and court process can be intimidating for a person from a culture of group consensus. Markers of power and prestige, such as the Magistrate or Judge seated at the high bench, the formal attire of the legal professionals, the accused seated in the dock, the visible police presence, and the use of terms such as 'your Honour', all contribute to an imbalance of power for the less powerful defendant.

As previously noted, and expanded on in Section Four, in the Koori Court, the formal process of the mainstream court is replaced by the culturally aware interaction of the 'Sentencing conversation', where all participants including the Judicial Officer, Indigenous Elders and the offender are seated around the bar table in the body of the court. The Koori Court is a sentencing court, under the jurisdiction of the Magistrates' Court, and in the case of the higher court, the County Court, with the same powers of sentencing as the mainstream court. This court is informal, culturally sensitive, and the participation of Indigenous Elders is paramount to its success. The Indigenous offender must elect to have their case heard in this court. Courtroom discourse is participative, collaborative, and all work towards a solution-focused outcome. The Magistrate or Judge alone decides the sentence.

This aspect of the legal process indicates that miscommunication can be much more than merely differences in communication in the courtroom. During the formal courtroom

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Multicultural Australia, University of New South Wales Press, 147-174; Eades, D, 'Legal Recognition of Cultural Differences in Communication: the case of Robyn Kina', (1996), 16 *Language and Communication,* 215-227; Eades, D 'Telling and retelling your story in court: Questions, assumptions and intercultural implications' (2007), 20 *Criminal Justice*, 209; and Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), in *Australian Law Librarian*, 18 (3), 185.

[82] Eades, D, 'I don't think it's an answer to the question: Silencing Aboriginal witnesses in court' (2000), 29 *Language in Society,* 161-195; Eades, D, *Courtroom Talk and Neocolonial Control (2008), Mouton de Gruyter;* Eades. D. 'Language and Disadvantage before the Law (2008)) in Gibbons, J and Turrell, M T, (eds), *Dimensions of Forensic Linguistics*, John Benjamins, 179.

discourse, the de-personalisation of the addressee shows an imbalance in the relationship between the more powerful to the less powerful, for example, referring to the defendant as 'Mr. X' instead of using their first name. In addition to a power imbalance and assumptions in the courtroom specific to the dominant culture, there are issues to do with social inequality and the disadvantage that accrues for a participant from a different socio-cultural group.[83] All these factors are recognised as contributing to misunderstanding between participants in the legal domain.

In the Koori Court, some of the power imbalance between legal professionals and the Indigenous offender is removed by the informal interactive nature of proceedings, and all participants have the opportunity to speak. Police presence is reduced, and often they are not visible in the courtroom. The Magistrate or Judge comes down from the high bench and is seated with all participants at the oval bar table in the centre of the courtroom. Indigenous Elders are seated either side of the Magistrate and directly across from the offender. The offender is greeted by first name, for example 'Good morning John', and introduced to all participants. Time is allowed for the offender to tell their story and in this way, any underlying problems behind the offence, such as homelessness, poor health, lack of education or job opportunities, may be uncovered and dealt with by the court.

2 *Cultural Assumptions*

In any communicative event in the legal domain between people from different cultural backgrounds, assumptions may arise between the speaker and hearer when there is no awareness of cultural and language difference. In the Victorian mainstream courtroom, an assumption may be made that because a person speaks English, they understand what is being said.[84] A Koori offender might 'appear' competent in the language, but cultural differences may lead to a breakdown in communication. This differs from Indigenous courts in areas elsewhere in Australia, such as the Murri Court in Queensland or Aboriginal

[83] Eades, D, *Courtroom Talk and Neocolonial* Control (2008), Mouton de Gruyter,34.
[84] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010), in *Australian Law Librarian*, 18, 3,189; Stroud, N, 'Accommodating Language Difference: A Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, Edited by Keith Allan, 116.

Community Courts in Northern Territory and Western Australia, where an Aboriginal speaker from a remote area who does not have English as a first language, is offered an interpreter.[85]

Misunderstandings may not only occur due to level of language competence but also be due to assumptions of a social, cultural or ideological nature. These may occur both in a mainstream court and also an Indigenous court unless cultural awareness training is carried out across all courts. For example, one day at a court hearing the Koori defendant failed to appear. A comment heard by the researcher made by a visiting lawyer at the bar table was 'Oh – he's probably gone walkabout!'[86] This could be taken as an assumption that because the defendant was an Aboriginal Australian, the stereotypical inference was that some people of that cultural background disappear into the bush from time to time for their own traditional activities. In this particular case, the absence was due to the kinship obligation to attend the funeral of a relative. It is important to note that the above comment would probably not have been made by a culturally aware legal professional. It illustrates that there is a continuing need for education and professional development of all participants who attend hearings in both mainstream and Koori Courts.

Kinship obligations are very important to an Indigenous person, and these often go un-recognised in a mainstream court. Aboriginal speakers must contend with an additional breakdown in communication which may be caused by cultural taboos which prevent the naming of a deceased person or the location of a sacred site. Direct questioning by lawyers on these subjects may be considered impolite by a Koori defendant.

Further communication difficulties are exemplified in the mainstream court when a question is asked by the lawyer for details of the time and place where an offence occurred. The Koori defendant may answer 'well, it was just after I had my lunch, and I was on my way to visit Uncle Alf'. This would seem perfectly reasonable as an answer to an Aboriginal speaker; however western expectations of a reply would be much more specific, with events marked in a chronological manner.

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[85] Bennett, P, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (2016), The Federation Press,112-117. See also Cooke, M, Indigenous Interpreting Issues for Courts (2002), Australasian Institute of Judicial Administration.

[86] Observation by the researcher made at a County Koori Court hearing, Morwell (2011).

Eades discusses how language ideologies impact on the interpretation and understanding of what people say.[87] This is evident in misunderstandings which occur in a court of law when an Indigenous defendant does not understand the question. These are impediments to successful communication which may lead to a miscarriage of justice.

Gumperz considers that it is 'much easier when participants share the same background'. When backgrounds differ, there can be 'misunderstandings, mutual misrepresentations of events and mis-evaluations'.[88] He continues in the same theme to say that 'what starts as isolated situation-bound communication differences [...] may harden into ideological distinctions that then become value laden, so that every time problems of understanding arise they serve to create further differences in the symbolization of identity'. As a non-Indigenous observer in both the mainstream court and the Koori Court, I support this comment. In comparison with the more formal mainstream court where the preconceived ideas of some participants may become a barrier to communication, in the Koori Court this is negated by the interaction of both Indigenous and non-Indigenous participants, which brings an overt awareness of differences to the courtroom discourse.

3 *Non-verbal Communication*

As examples given earlier in this section clearly show, miscommunication is much more than merely differences of discourse in the courtroom. Other non-verbal factors play a significant part, such as the use of silence and paralinguistic features such as gesture, facial expressions and eye movements. The body language of a defendant may suggest a confident or negative attitude. Another factor may be the lowered gaze of a defendant, which in some Indigenous communities is considered culturally polite but may be interpreted by legal professionals as shifty or non-cooperative. Paralinguistic features can also include tone of voice which can alter meaning of what is said.

Some of these culturally specific non-verbal signs observed in Victorian courts are examined below.[89]

[87] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 193.
[88] Gumperz, J, (Ed), *Language and social identity* (1982), Cambridge University Press, 2-3.
[89] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 177; see also Stroud, N. 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011), in

Use of Silence

In the western tradition of discourse, silence can be used as a strategy in conflict situations if a person would rather not confront someone.[90] Gibbons notes that while silence is often an appropriate response for an Indigenous speaker, 'in common law, silence is not an available option'.[91] Moreover, as Eades points out, silence is an important and positively valued part of many Aboriginal conversations, while in western societies silence is negatively valued and viewed as a breakdown in communication.[92] In the context of formal court proceedings, silence indicates an unwillingness to answer.

This highlights the problem for an Indigenous offender in the mainstream court, when they use silence as a positive form of communication, sometimes beginning an answer with silence. This is not always understood by legal professionals, who may regard this as a negative response and thus miss the opportunity to hear the original answer to the question.[93] An Aboriginal offender might also use silence as a way of collecting their thoughts, and this could lead to a lawyer interrupting the answer and not hearing the full story and context of the incident. Consequently, an understanding of these sorts of cultural differences is essential for successful communication in court proceedings which involve Aboriginal speakers.

In discussing the interaction between speakers and hearers, Goodwin[94] suggests that silence should be classified differently according to whether it occurs within the turn of a single speaker (= pause) or between the turns of two different speakers (= gap).[95] When carrying

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Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, Aston University, Birmingham, U.K. July 2011, edited by S Tomlin, N McLeod, R Sousa-Silva and M Coulthard, 122, (on length of silence in the Koori courtroom).

[90] Kakava, C, 'Discourse and Conflict' (2003), in Schiffrin, D, et al (eds) *The Handbook of Discourse*,Analysis, Blackwell Publishing, 654.

[91] Gibbons, J, *Forensic Linguistics: An Introduction to Language in the Justice System* (2003), Blackwell Publishing, 207.

[92] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 114.

[93] Eades, D, *Sociolinguistics and the Legal Process*, (2010), Multilingual Matters, 90. Also see Auty, K, *Black glass: Western Australian courts of native affairs 1936-54* (2005), Fremantle Press. Auty argues that Aboriginal persons used silence as resistance to elude the courts and police interrogations when in the unjust native's court system. Evidence was that they were still convicted, sentenced and incarcerated.

[94] Goodwin, C, *Conversational Organization: Interaction between speakers and hearers* (1981), Academic Press.

[95] Ibid. See also Sacks, E, Schegloff, E, and Jefferson, G, 'A Simplest Systematics For the Organization of Turn-Taking for Conversation,' (1974), in *Language,* 50, 4, 715.

out an in-depth analysis of discourse, the distinction is significant when identifying cultural and language differences.

The importance of silence is built into Aboriginal discourse, and is recognised in the Koori Court. In this court, time is taken to acknowledge that the offender is considering their answer. Sometimes a silence of five to ten minutes has been observed by the researcher, while all at the table are given the opportunity to read a document and consider their answer. This is one of the advantages of the Koori Court process, which recognises the Indigenous communicative style of silence in the discourse.[96]

Lowered Gaze

Goodwin suggests that face-to-face interaction can be affected by the direction of glances between the speaker and hearer.[97] He considers there is successful interaction between speaker and hearer when mutual orientation occurs (when a speaker uses gaze to indicate that the hearer is the addressee of his utterance). Misunderstanding may occur when there is a difference between the speaker's intended meaning/intention and the hearer's interpretation. [98]

Observations of courtroom hearings in both the mainstream court and Koori Court have revealed differences in the lowered gaze of the Aboriginal defendant. In the mainstream court, the defendant is in the dock and represented by their lawyer and is not part of the process. If in answer to a question during the hearing they lower their gaze, they are sometimes thought to be shifty or non-cooperative.

Although a lowered gaze has been considered in the past a mark of politeness and respect for an Aboriginal person, particularly among some Indigenous communities around Australia, this is not so in the Koori Court. In this court, some Elders seated directly opposite the offender insist on direct eye contact as a way of ensuring that the offender understands the seriousness of the offence and is accountable for their actions. The Elder will say to the

[96] Stroud, N, 'Accommodating Language Difference: A Collaborative Approach to Justice in the Koori Court of Victoria' (2006). Selected Papers from the 2005 Conference of the Australian Linguistic Society, Edited by Keith Allan, 2006, 7.
[97] Goodwin C, *Conversational organisation: Interaction between speakers and hearers (*1981), Academic Press, 9-10.
[98] Ibid.

defendant across the table 'Look at me when I speak to you!' or even give a command to 'Eye-ball me'! Direct communication of this form is unusual in mainstream courts.

Culturally specific gestures

In addition to the culturally specific assumptions as mentioned earlier in Section Four of this chapter, Goodwin notes there are additional cultural differences which may not be recognised in a mainstream court.[99] The body language and attitude of Indigenous defendants are non-verbal linguistic features which reveal much about the person, such as the use of hand movements or shrugs, which can mean 'I really don't want to answer that question as I don't think it appropriate'. An example of this would be following questioning, an Aboriginal offender may not be able to give the name of a sacred place or the name of a deceased person due to kinship obligations or cultural taboos.

A further example concerning body language occurred one day at a hearing of the Koori Court. The defendant entered the courtroom with a decided 'swagger' at the start of proceedings, only to leave the court after the 'sentencing conversation' with head bowed and in tears after feeling 'shame' at being confronted by the respected Elders of their Indigenous community. The events that unfolded that day allowed background details to come out that revealed the 'swagger' was simply an act of bravado that masked a story of disadvantage and abuse.[100]

B ***Communicative Style***[101]

[99] Goodwin, C, Goodwin, C, *Conversational Organization: Interaction between speakers and hearers* (1981), Academic Press, 29, 57.

[100] This example demonstrates a unique change in behaviour can take place when an Aboriginal defendant in the court is in the presence of a respected Indigenous Elder of the local Koori community. This is in marked contrast to the behavior of a defendant in the mainstream court who is not involved during the court process but speaks through their lawyer. The Koori offender is required to be accountable for their actions and their behaviour reflects any disappointment of their Elder (see Ch 6, p13-14 for a further example of the importance of body language).

[101] For a comprehensive list of difficulties experienced by Aboriginal speakers, see the Human Rights Commission - Submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Federal Court of Australia, Queensland No. QUD 300/2005 on Common Difficulties facing Aboriginal Witnesses (2007), at *https://www.humanrights.gov.au/commission-submission-1.*

As previously noted in Section Four A, there is some overlap between pragmatic and communicative features when identifying the barriers to communication in the mainstream courtroom. 'Communicative style' focuses more on how we say things, for example the way speakers communicate. Misunderstandings can occur during the formal court hearing when the defendant has a different communicative style to the legal professional, and is unsure of the court process. Problematic linguistic discourse features may include difficulties with the legal register and complexity of legal language, the question/answer format, the use of 'gratuitous concurrence' in answer to a question,[102] language accommodation towards the dominant speaker,[103] different notions of time and place, cultural taboos which prevent the naming of a sacred place or deceased person, or syntactic, semantic or lexical differences of meaning of an utterance. There may be a breakdown in communication if any one of these features are present at a court hearing.

Another key factor compounding these communication difficulties for Aboriginal Australians in the criminal justice system is the problem of Indigenous hearing loss.[104] There is a high incidence of middle ear disease among this socio-cultural group, which has been called the 'disease of disadvantage', attributed to poor hygiene, crowded housing and lack of medical attention. This has an impact on multiple areas of their lives, with poor education outcomes, defiance and non-compliance with police, isolation and a high level of anxiety in prisons, and not being understood in the courts. Professionals in the courts are the least equipped to work with hearing loss, assuming they have little experience of similar disadvantage.

To improve communication in the court system, there must be greater awareness of understanding together with a process to address disadvantage of present and past hearing loss. According to barrister Munya Andrews, Aboriginal people are doubly handicapped – they are Indigenous and also may suffer from hearing loss.[105] The Koori Court pays attention to Aboriginal people with any hearing difficulties, and many courts have now installed

[102] 'Gratuitous concurrence' is a term initially coined by Liberman (1980), and later well documented by Eades (2012) to describe the tendency for Aboriginal witnesses to agree to a proposition, saying 'yes' to a question but only meaning 'yes – I hear you', not 'yes – I agree'.
[103] See Eades, D, 'Communication with Aboriginal Speakers of English I the Legal Process' (2012), in *Australian Journal of Linguistics,* 32,4, 478.
[104] Indigenous Hearing Loss Seminar, 5 March 2012, Owen Dixon Chambers, Melbourne.
[105] Dr. Munya Andrews, speaker at Indigenous Hearing Loss Seminar, 5 March 2012.

technology to aid the hearing impaired. In addition, the Magistrate continually checks for understanding throughout the court process.

Another significant factor is that all participants are seated together around the table including the Magistrate or Judge, Indigenous Elders and the Koori offender. By ensuring miscommunication is kept to a minimum in the courtroom, the aim of the Court is to listen to the narrative given by the offender, and consider any underlying problems which may have caused the offence. The need to ensure full understanding and clear communication is a high priority of all the participants in Koori Court.

1 *Legal Register*

The discursive style of the legal process is formal, specialised, and lexicon specific to the legal domain. An instruction may not be understood due to a difference in semantic meaning of an utterance. The complexity of legal terminology may also allow for the possible manipulation of language by lawyers.[106] Honorifics used by legal counsel further increase cultural and social distance, creating disadvantage for an Indigenous speaker who is already a less powerful figure in the legal or courtroom context.

In the Koori Court, the interactive and collaborative style of this culturally sensitive court addresses some of the difficulties experienced in the mainstream court.[107] As described earlier, the language in this court is simplified, and the Judge or Magistrate checks for understanding during the hearing process.[108] The inaugural Magistrate in the Shepparton Koori Court, Magistrate Auty, notes that the presence of Indigenous Elders at the bar table for the Sentencing Conversation brings not only respect to proceedings for an Indigenous

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[106] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011), in Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, Edited by S. Tomlin, N MacLeod, R Sousa-Silva and M Coulthard, Birmingham, UK, <http://www.forensiclinguistics.net/iafl-10-proceedings>..

[107] Stroud, N, 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, 10, edited by K. Allan, at <www.als.asn.au/proceedings/als2005/stroud-koori.pdf>.

[108] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012) In Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, Edited by S. Tomlin, N MacLeod, R Sousa-Silva and M Coulthard, Birmingham, UK, 118, <http://www.forensiclinguistics.net/iafl-10-proceedings>.

offender, but a conscious awareness of linguistic features of Indigenous speaking styles to courtroom discourse.[109]

Along with the reframed roles of interactive and collaborative participants, the offender now has a voice in the Koori Court. The formal legal style is mitigated and replaced with an informal format, allowing a narrative style as used by speakers familiar with an oral culture, overcoming speaker/hearer inconsistencies. The use of plain English, together with an awareness by legal professionals that if certain pragmatic, semantic or syntactic features are avoided (such as tag questions, direct questions, specialized legal jargon), communication is improved between all participants. The offender has time to tell their story instead of speaking through their lawyer. They are part of the process.

An interesting feature in the Swan Hill Koori Court is its 'Wamba Wamba Language Initiative', launched in July 2009. The local Aboriginal Wamba Wamba language is spoken by the Elders and Respected Persons at the opening and closing of each matter heard. This is a significant innovation, and an example of the court and Indigenous community working together.[110] It is hoped that this communicative feature will be extended to other Indigenous community Koori courts in the future, as it brings respect to the court and a reconnection for the offender to the Koori culture.

2 *Lexico-Semantic Meaning of Utterance*

One cause of cultural misunderstanding may be with the highly technical vocabulary used, and the different semantic meaning of an utterance.[111] Eades compares different meanings of the verb 'to carry on' between Aboriginal and non-Aboriginal speakers. For a non-Aboriginal speaker this can mean 'lacking good sense, foolish, stupid'. However, for an Aboriginal speaker, it can also mean 'insane, out of one's mind, or violent as a result of being

[109] Auty, K, 'We teach all Hearts to Break – But Can we mend them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) 1 elaw (special series) 101, 118-119. <https://elaw.murdoch.edu.au/archives/special_series.htm>.
[110] Magistrates' Court of Victoria Annual Report, (2009) 10:49.

[111] 'Lexico-Semantics'is the study of meaning (semantics) of words and phrases (lexical items) in discourse. See Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 222.

drunk'. An Indigenous defendant in the mainstream court may say 'he carried on silly', but because of a difference of semantics, this may mean he had been extremely violent, hitting someone on the head with a fence paling, threatening another, and breaking another's spine with a golf club.[112] This could cause a grave miscarriage of justice, as a difference of semantic utterance in a case such as the above example, did not even make it into the written police report prior to the court hearing.

During courtroom discourse, there may also be cultural challenges such as unfamiliar words or the same words spoken when the legal vocabulary has a different meaning to the ordinary meaning. The Koori Court is adaptable to cultural needs, including changes in lexis and semantic meanings. The Indigenous Elders contribute to the discussion at the bar table, and bring their cultural knowledge and style of discourse to the table.[113] Any difference in meaning of a word or phrase is explained.

3 *Question/Answer Format*

The question/answer format used in the mainstream court may be difficult for people used to a narrative or oral culture of communication.[114] Gibbons comments that attitudes to knowledge are quite different in Aboriginal societies from those found in western societies.[115] For an Indigenous speaker, direct questioning is considered rude and intrusive. Answering is not obligatory and, as earlier described, silence is often an appropriate response.

In the traditional Aboriginal society, questioning is generally done with great caution, and the indirect raising of a topic is preferred. Non-lexical elements of communication such as prosodic features of intonation and voice quality such as pitch and stress may also affect

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[112] See Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 174; For further reading see Liberman, K 'Understanding Aborigines in Australian Courts of Law' (1981), 40 *Human Organization: Journal of the Society for Applied Anthropology,* 247-255; Cooke, M, Indigenous Interpreting Issues for Courts (2002), *Australasian Institute of Judicial Administration*; Eades, D, 'Telling and Retelling your Story in Court: Questions, assumptions and intercultural implications*'* (2007*),* 20, *Criminal Justice,* 209.

[113] County Koori Court of Victoria, 'Final Evaluation Report' 27th September 2011, Department of Justice, 9.

[114] See Eades, D, 'Communication with Aboriginal Speakers of English in the Legal Process' (2012), *Australian Journal of Linguistics*, 32,4, 473-489.

[115] Gibbons, J, *Forensic Linguistics: An Introduction to Language in the Justice System* (2003), Blackwell Publishing, 206.

discourse.[116] An example of this is that for some Aboriginal speakers, an 'h' sound at the start of a word may not be pronounced, and this may cause miscommunication. It is interesting to note that in the Koori Court, the bicultural ability of several participants at the Koori Court hearing ensures that there is a marked awareness of cultural differences such as this. For Aboriginal speakers, direct questions are used for public details such as 'Who's your mob?',[117] but an indirect two-way exchange is culturally more acceptable for a more personal question, with silence to consider a response.[118]

As Eades notes, 'information seeking in Aboriginal cultures is indirect, more time-consuming and involves much more reciprocity than one-sided interviews'.[119]

Forms of tag questions which intimidate and cause confusion for defendants may also cause communication problems. An example of a tag question is when a form such as 'isn't it?' is appended to a statement during questioning by a lawyer in a mainstream court. This creates the possibility of manipulation of the discourse by the lawyer, which may occur with a tag question such as 'You were at the park, '*weren't you?*', or 'She spoke to you at the time, '*didn't she*?'. It can often confuse witnesses and the accused, to have the negative tag added to the end of the question, because it is hard to know whether to answer 'Yes' because she did speak to him, or 'No', because she didn't.

Psychologist Elizabeth Loftus[120] carried out numerous experiments that showed how the simple phrasing of a question can have a substantial effect on the testimony of an eyewitness. She showed how the use of tags to interrogate subjects would influence their answers. This may occur in the more formal mainstream court, however my data shows that in the Koori Court when there is cross-cultural awareness and constant checking by the Magistrate, checks are in place to ensure that the offender understands proceedings.

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[116] The term 'prosodic' describes features such as pitch, stress in intonation, or loudness.
[117] For Aboriginal people, it is important to know to which Indigenous community another person belongs. In Victoria, due to the early days of colonialism and the forced movement by governments of Indigenous groups from one settlement to another (also the separation of children from their families), kinship knowledge is very important to an Aboriginal person.
[118] Eades, D, *Aboriginal Ways of Using English*, (2013), Aboriginal Studies Press, 67.
[119] Ibid, 113.
[120] Loftus, E. F. *Eyewitness Testimony* (1979), Harvard University Press.

Of equal significance when examining the Question/Answer format is again the matter of the imbalance of power which can occur.[121] This invokes the issue of 'linguistic accommodation'. People tend to alter their manner of speech to accommodate to others.[122] It can affect many areas of language, including accent, loudness, rate of speech and style of speech, vocabulary and even grammatical aspects such as the length and complexity of utterances. The behaviour is a two-way thing - one person may do all the accommodating or both may adapt. In the mainstream courtroom, 'language accommodation' may occur between the legal professional and the Aboriginal offender, with discourse likely to be one way, towards the dominant speaker (i.e. the legal professional).

This form of linguistic accommodation is known as 'gratuitous concurrence',[123] where a defendant may answer 'yes' to questions, sometimes only meaning 'Yes, I hear you', rather than 'yes I agree'. Typically, in Anglo-Australian court processes, there can be only a 'Yes' or 'No' answer, and 'yes' indicates agreement to the proposition put to the witness.[124] This researcher has not observed problems of gratuitous concurrence at any hearings of the Koori Court, as both the Judicial Officer and the Indigenous Elders give the defendant the opportunity to tell their story if they wish, with all participants able to listen to the narrative. This is culturally more sensitive for an Aboriginal speaker than the Question/Answer format, and results in more reliable evidence being communicated in the hearing (and thus removes the chances of gratuitous occurrence).[125]

A further feature of the question/answer format, and one which has a wider significance as part of the accommodation feature, is that of 'hedging', a discourse marker in spoken discourse used by both Indigenous and non-Indigenous speakers. An example of linguistic 'hedging' would be - '*all I know* is that he said he was coming to the court today'. This discourse marker is a communicative resource of tentativeness and possibility used by

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[121] Liberman, K, 'Understanding Aborigines in Australian courts of law' (1981), in *Journal of the Society for Applied Anthropology*, 40, 3,247-255; Eades, D, 'A Case of Communicative Clash: Aboriginal English and the Legal System' (1994), in Gibbons, J (ed) *Language and the Law*, Longman Group, 246.
[122] Ibid, Liberman, K (1981).
[123] See Eades, D, 'Communication with Aboriginal Speakers of English in the Legal Process' (2012), *Australian Journal of Linguistics*, 32, 4, 478-479.
[124] Ibid. See also Stroud, N, 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K Allan, at <http://www.forensiclinguistics.net/iafl-10-proceedings>, 3.
[125] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 221.

speakers, and may be used by an Indigenous speaker to soften the impact of an utterance.[126] This lexical feature may indicate the speaker's less powerful social standing and thus their answer is perceived as less convincing.

4 *Notions of Time and Place*

The way speakers interpret notions of time and place differ between cultures. In the Western tradition, details of time and place have a specific measurement, verified by reference to clocks, watches, and geographical markers such as maps. An Aboriginal speaker may talk about time or distance in different ways, relating them to a social event or situation rather than a quantifiable specification.[127] In the mainstream courtroom, legal professionals are not equipped with background knowledge of local geographical markers, and find many Aboriginal speakers vague in their answers when describing events. This may cause a breakdown in communication and may result in a court order or a break of parole because of a misunderstanding of the date of hearing.

In the Koori Court, differences in expressing time and distance may be recognised and indirect ways of seeking information are acknowledged as a cultural difference, for example, when time and place are described in different ways.

V Issues Regarding Methodology and Analysis[128]

In order to understand the complexities of cross-cultural discourse in the legal domain, this section discusses the methodology used for this study, and how I apply the accepted linguistic theory as described in Section Two to the analysis of language in the Koori Court.

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[126] Hyland, K, 'Writing Without Conviction? Hedging in Science Research Articles' (1996) in *Applied Linguistics*, 17 (4), 433-454.

[127] Eades, D, 'Aboriginal English on trial: the case for Stuart and Condren' (1995), in Eades, D (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia,* University of New South Wales Press, 159; Eades, D, *Aboriginal Ways of Using English,* (2013), Aboriginal Studies Press, 50-55; Cooke, M, 'Aboriginal evidence in the cross-cultural courtroom' (1995), in Eades, D, (ed*), Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, University of New South Wales Press, 55-96; Stroud, N, 'Accommodating Language Difference: a Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, at <www.als.asn.au/proceedings/als2005/stroud-koori.pdf> (2006),4.

[128] My thanks to Louisa Willoughby, Linguistics Program, Monash University, for making available references regarding discourse analysis of language.

Following a discussion on how the Koori Court addresses language difference in the courtroom, I demonstrate a move from the large-scale macro-socio-cultural context (big picture) to examine the in-depth micro analysis approach (such as face to face interviews of participants and analysis of audio recordings). This approach is necessary to tease out cultural and language differences which cause a breakdown or barrier to communication. However, I agree with Eades that both methods of analysis are essential for understanding the complexities of cross-cultural discourse.[129] Eades considers that Indigenous courts should be important settings for sociolinguistic research in the future.[130] The aim of this research is to carry out a more detailed analysis of actual courtroom discourse than has been possible in the past.

I examine data using the interpretive methods of analysis informed by the studies of Gumperz, as outlined in Section Two of this chapter. Gumperz stresses the importance of gaining qualitative insights when analysing speech events of speakers with differing social and ethnographic backgrounds,[131]and I am mindful of this when analysing data of court proceedings. Gumperz notes that there are

> tacitly understood rules of preference, unspoken conventions
> 'the participant structure of such events thus reflects a real power asymmetry underneath the surface equality, a serious problem when the lesser communicator does not know the rules.[132]

In Part A of this Section I apply Gumperz' analytical framework of Interactional Sociolinguistics, and demonstrate why this is considered the best approach for this study. Part B draws on a sociolinguistic discourse analysis approach of gathering evidence of actual language use (what is said), and examine this in the context of the courtroom, using ethnography of communication to understand ways of communicating (how it is said).[133] I then consider any additional approaches of sociolinguistic analysis in order to understand which accepted linguistic theories may be best adapted for this cross-cultural study of communication.

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[129] Eades, D, *Sociolinguistics and the Legal Process* (2010), 226.
[130] Ibid.
[131] Gumperz, J, (ed) *Language and social identity* (1982), Cambridge University Press, 8-9.
[132] Ibid.
[133] See Eades, D, *Sociolinguistics and the Legal Process*, Multilingual Matters, 14-15.

A *Analytical Framework of Interactional Sociolinguistics*

As defined in Section Two, Interactional sociolinguistics is chosen as the optimal theoretical framework for analysis of cross-cultural communication and interaction of participants at the court hearing in the criminal justice system.[134] Using an empirical approach, I examine evidence of language use in the courtroom to identify ways in which language is enhanced or inhibited in communication between an Indigenous Australian with legal professionals in the context of the legal domain.[135]

Informed by comparative law, language in the formal mainstream court process and practice is compared with that of the culturally aware Koori Court, to identify if cross-cultural issues of miscommunication are addressed in this alternative sentencing court. It is clear that cultural variation in communication in the courtroom has the potential to impact on an appropriate outcome for an Indigenous offender.

As earlier described, Interactional sociolinguistics uses discourse analysis to study how language users create meaning via social interaction. This approach has its origins in anthropology and sociology and also conflates with ethnography of communication, as earlier described.[136] The approach is also informed by other sub-disciplines including Speech Act theory, as formulated by Austin and Searle[137] and demonstrated in culture-specific discourse. The above analytical approaches all help tease out the complexities of cross-cultural discourse.

When analysing interaction in a courtroom, contextualisation cues (as discussed in Section Two), serve as guideposts for monitoring the progress of conversational interaction. According to Gumperz, 'context plays a much more important role in the analysis process – charts norms and expectations for communication in particular contexts'.[138] I use

[134] Tannen, D, 'Language and Culture' (2006), in Fasol, R and Linton, J, (eds), *Introductory Linguistics Textbook,* Blackwell, Malden, MA.
[135] See Chapter Five, Methodology, for a full account of the methodology used for this interdisciplinary study of communication in the criminal justice system.
[136] Gumperz, J. *Discourse Strategies,* (1982), Cambridge University Press, 154-155.
[137] Also see the work of Austin, J, *How to do Things with Words* (1962), Oxford University Press, and Searle, J, *Speech Acts: An Essay in the Philosophy of Language* (1969), Cambridge University Press.
[138] Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press, 130-134.

contextualisation cues as signalling markers as guide posts for understanding information on the goals and outcome of a conversation. Gumperz suggests that these subtle signals, which are culturally specific, may not be recognised and may lead to misunderstandings.[139] Such notions of contextualisation are therefore an invaluable tool in the monitoring of the progress of conversational interaction in the Koori Court.[140]

I consider a further approach when examining communication and interaction in the courtroom, that of the sociologist Goffman (discussed earlier in Section Two of this chapter). Goffman looks at social interaction and discusses 'face' in the interaction ritual.[141] He argues that maintaining 'face', and taking responsibility that actions have created,[142] is a basic structural feature of interaction, especially the interaction of face-to-face talk. This framework for analysis is particularly relevant in the study of interaction of participants in the 'Sentencing Conversation' of the Koori Court, which requires Indigenous offenders to be accountable for their actions when seated across from the Magistrate and Indigenous Elders of their community.

Goffman's 'participation framework'[143] is an essential background for interaction analysis in the Koori Court. He considers that 'when a word is spoken, all those who happen to be in perceptual range of the event will have some sort of participation status relative to it'.[144]

The practice in the mainstream court appears to flout this theory, as an observation of formal court proceedings reveals a lack of participation by the defendant in the dock, who relies on their lawyer to participate on their behalf. Conversely, in the Koori Court, all at the bar table participate in proceedings.

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[139] Ibid.
[140] Gumperz, J, and Cook-Gumperz, J, 'Introduction: language and the communication of social identity' (1982), in Gumperz, J, (ed), *Language and Social Identity*,18.
[141] Goffman, E*, Interaction Ritual: Essays in Face-to-Face Behaviour* (1967), Aldine Publishing Company, Chicago.

[142] Ibid.
[143] Goffman, E, *Forms of Talk* (1981), University of Pennsylvania Press, Philadelphia.
[144] Goffman, E, *Forms of Talk* (1981), Section III.

Goffman also discusses 'the avoidance practice' in interaction, followed by 'the corrective process' as a model for interpersonal ritual behaviour.[145] He acknowledges that emotions may play a part in any interaction. In a conventional court hearing, this may mean a communication breakdown in the formalities. However, if this occurred in the Koori Court and an offender refused to change their behaviour, the Magistrate or Judge would consider any relevant circumstances behind the offence, prior to pronouncing the sentence.

In addition to the above approaches, I draw on a further theoretical principle relevant to my analysis (mentioned at the start of this chapter), that of Speech Act theory, which gives an awareness of how misunderstanding may occur in explicit or implicit discourse during cross-cultural communication between speaker and hearer in the courtroom context.[146] In describing language as a discursive element, the philosopher Austin refers to utterances as 'performative', and the work they do 'speech acts'.[147] This analysis examines the utterances and behaviour of a speaker and hearer in any communicative act in the courtroom context. Many speech acts are culture-specific.[148] For example, an Indigenous speaker is more likely to use indirect speech acts as an appropriate response to a directive, and since successful communication relies on the hearer being able to understand the speaker's meaning and intention, this may cause serious miscommunication in the formal courtroom.

It is clear that when considering cross-cultural interaction in the courtroom, it is important to recognise speech acts which are culture-specific. To enable a complete picture of the interaction of cross-cultural language speakers in the legal context, it is necessary to conduct both a visual observation of interaction (if possible as video data), in addition to in-depth analysis of audio-tapes of courtroom discourse. These features are described above in Section Four of this chapter, and my findings of cross-cultural interaction in the Koori Court are exemplified in my findings in Chapters 6 and 7.

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[145] Goffman, E, 'On Face-Work' (2nd ed, 2006) in Jaworski, A, and Coupland, N, (eds), *The Discourse Reader,* Routledge, 299-305.
[146] Austin, J.L. How to do things with words (2nd ed, 1975), Oxford University Press.
[147] Ibid.
[148] See Y.Huang, in Allan, K, (ed) *Concise Encyclopedia of Semantics* (2009), 924. Also refer to Searle, J, *Speech Acts: An Essay in the Philosophy of Language* (1969), Cambridge University Press; J.L. Austin 'How to do things with words' (2nd ed, 2006), in Jaworski, A, and Coupland, N (eds), *The Discourse Reader,* Routledge, 55-65.

As discussed in Section Two of this chapter, Paul Grice[149] maintained there are certain cooperative principles (maxims) which are essential for successful communication. A significant factor is that of recognising that there may be different ways of expressing values and politeness during discourse. In order to understand these differences, I drew upon the insights of three different approaches (already touched upon in Section Two), namely, those of Brown and Levinson, Wierzbicka and Clyne.

Firstly Brown and Levinson's theoretical approach, (also discussed in Section Two), is that politeness can be explained within a universal theoretical framework across cultures.[150] They maintain that linguistic cues of some social variables such as power and control, gender differences and cross-cultural interaction, do not undermine their theory.[151] However, my observation of cross-cultural communication at hearings in the mainstream criminal justice system did not support this universal approach. There was a marked difference in how politeness was viewed between cultures. As an example of this is that in the Aboriginal culture, indirectness is considered polite in interaction, and an Aboriginal speaker may not give the answer required due to the need for privacy or to avoid confrontation.

Secondly, in her 2003 edition of *Cross Cultural Pragmatics*, Wierzbicka also challenged some of the Gricean and Brown and Levinsonian paradigms for their 'anglocentric' character of supposedly universal maxims.[152] Correspondingly, she also questioned some of the pragmatic theories of Grice from a philosophical as well as a cross-linguistic point of view. In her second edition of the same book Wierzbicka noted that 'the tide had now changed'.[153]

[149] Grice, H.P, *Studies in the Way of Words,* (1989), Harvard University Press, Cambridge, 24-40; see also 269-282 on presuppositions and conversational implicature; Grice, H.P. *Logic and Conversation* (2nd ed, 2006), in Jaworski and Coupland (eds), *The Discourse Reader,* Routledge, London, 66.
[150] Brown, P and Levinson, S, *Politeness: some universals in language usage*, (1987), Cambridge University Press, Cambridge, 13.
[151] Ibid, 29-34.
[152] Wierzbicka, A, *Cross-Cultural Pragmatics*, (2nd ed, 2003), Mouton de Gruyter, v-xxii.
[153] Ibid, xiii.

Thirdly, Clyne, with similar concerns, reformulated three of Grice's maxims to take into consideration cultural aspects of communication, and this the most relevant to my study of cross-cultural communication in the Koori Court.[154]

1 To the maxim of Quantity, Clyne added 'within the bounds of the discourse parameters of the given culture.'

2 To the maxim of Quality, Clyne changed this maxim to read 'try to make your contribution one for which you can take responsibility within your own cultural norms'.[155]

3 To the maxim of Manner, Clyne says that unless you make clear your intent and structure your discourse according to the requirements of your culture, this maxim may run counter to norms of politeness and respect. [156]

For effective communication to occur in the criminal justice system, it should include shared knowledge of cultural conventions between all participants, and the Koori Court appears to articulate the maxims above in accordance with Clyne's consideration of cultural difference. However, some of Clyne's reformulations of Grice's maxims continue to be a matter of debate, and detailed analysis of courtroom discourse should support or contradict these maxims.

Contemporary linguistic theory holds that there has been a shift away from the traditional approach of Brown and Levison's seminal research on 'politeness'.[157] These include shifts in accepted theory by Wierzbicka, noted earlier,[158] who observes the extent of cross-linguistic and cross-cultural differences in ways of speaking, also the acceptance of different attitudes and values of politeness. This is supported by Culpepper[159] and Haugh,[160] who use a contemporary approach to language to explore the sub-themes of 'intercultural

[154] Clyne, M*, Inter-cultural communication at work: Cultural values in discourse* (1994), Cambridge University Press, Cambridge.
[155] Ibid. This maxim is particularly relevant to communication in the Koori Court, for example with cultural differences such as notions of time, distance and kinship taboos.
[156] Ibid.
[157] Brown, P, and Levinson, S, *Politeness: some universals in language usage* (1987), Cambridge University Press.
[158] Wierzbicka, A, *Cross-Cultural Pragmatics: The Semantics of Human Interaction* (2nd ed, 2003), Mouton de Gruyter, Berlin, v-xxii.
[159] Culpepper, J. *Impoliteness; Using Language to Cause Offence* (2011), Cambridge University Press.
[160] Haugh, M, *Im/Politeness Implicatures* (2014), Mouton de Gruyter. 11.

(im)politeness' and '(im)politeness in interaction'.[161] Culpeper and Haugh pose an interesting question - 'what if the concepts with which we are analysing politeness are themselves culturally based?'[162] Some interesting answers to this question should be revealed in the final chapters of this thesis under Analysis and Discussion.

Despite the work of these linguists, there is still resistance by some who continue to hold Gricean and Brown and Levinson paradigms the same esteem that they once were when describing the different ways of speaking and thinking linked with different cultures. This thesis will further challenge the universality of these paradigms.

B *Discourse Methods for Analysis of the Communicative process*

When considering the optimal method of analysing discourse in the legal domain, sociolinguistic analysis is proposed as the best tradition of analysis for the study of the structure of what is said in the courtroom, and the manner in which it is said.[163] Within this analytical approach, I use the frameworks of Interactional Sociolinguistics (as discussed in part A of this section), together with Conversation Analysis,[164] informed by ethnomethodology, which allows a detailed micro-analysis of courtroom talk which can identify patterns and socio-cultural variation in the interactive speech of participants. This approach is supported by Heller, who notes that 'the work of Schegloff, Jefferson and Sacks laid the groundwork for Conversation Analysis, Ethnomethodology's major contribution to the analysis of discourse in interaction'[165] to study effective communication among language users.

It is important to note there are a number of difficulties which may face the analysis of cross-cultural communication. According to Schiffrin:

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[161] (Im)politeness and Language is the theme of the Language and Society Centre's (LASC) 6th Annual Roundtable, held November 6-7, 2014.
[162] Culpeper J, and Haugh, M, *Pragmatics and the English Language* (2014), Palgrave Macmillan, 206.
[163] Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 14-15.
[164] Conversation Analysis is used for detailed micro-analysis of spoken language collected in recorded interviews with participants in addition to audiotapes of courtroom hearings. Interesting patterns of instances of lexico-semantic utterances, turn-taking, hedging, pauses and length of silence, are analysed for understanding of cooperative discourse and interaction.
[165] Heller, M, 'Discourse and Interaction' (2003), in Schiffrin, D, et al, *The Handbook of Discourse Analysis,* Blackwell Publishing, 253.

> many ethnographies of communication have shown that cultures differ dramatically in terms of what speaker goals are culturally encoded in patterns of speaking, as units of speech (acts, events), and in situations for speech, […] but the rules for accomplishing what might at first seem to be the same act often differ tremendously, greatly complicating efforts for cross-cultural comparisons of speech acts[166]

Following the analysis of data collected using the above methodology and analytical approach, consideration is given to any contemporary linguistic theories which may require adaption for cross-cultural investigation of language in the legal domain. Results and recommendations will be found in the final chapters of Analysis and Discussion of this thesis.

VI Conclusion

This chapter encapsulates a brief review of established theoretical knowledge of sociolinguistic practices over the past thirty or more years, taking into account important debates in contemporary linguistics as they relate to communication in the courtroom. The chapter discusses the role of language in the legal system and the sometimes overt, sometimes subtle part culture plays in communication. For the Indigenous offender in the legal domain, communication may be influenced not only by a marked imbalance of power, but by cultural and linguistic differences in the courtroom discourse involving both Standard English and Legal English, as well as Aboriginal English.

The chapter examines the way language is used in the courtroom, using linguistic tools of interactional sociolinguistic discourse analysis and informed by ethnomethodology and sociology. This approach aims to provide a deeper level of understanding of why miscommunication occurs when cultural and language difficulties are not recognised. Specific difficulties and misunderstandings which may occur in the mainstream courtroom between Indigenous Australians and legal professions are discussed, followed by ways in which the Koori Court addresses these misunderstandings.

Observation of hearings in both the mainstream court and Koori Court provides a macro socio-cultural picture of communication between Aboriginal speakers and legal professions.

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[166] Schiffrin, D, *Discourse markers* (1987), Cambridge University Press, Cambridge, 11-12; also see Schiffrin, D, Tannen, D & Hamilton, H, (eds), *The Handbook of Discourse Analysis* (2003), Blackwell Publishing, 54.

This is followed by audio-recorded interviews of courtroom participants, together with some full hearings of court cases in the Magistrates' Koori Court. A microanalysis of transcripts of courtroom discourse identifies patterns or variations of discourse. Analysis of the data determines any changes in awareness, changes in attitude, and acknowledgement of difference by legal professionals, which is essential in closing the gap of Indigenous disadvantage for a Koori offender in the Victorian legal system. Results should reveal if the Koori Court of Victoria is an appropriate culturally aware forum where Indigenous Australians may have their voices heard, and where people will listen.

The chapter concludes that while accepted linguistic theory may provide an answer for miscommunication in some contexts, there must be a different way of analysing interaction between interlocutors who do not necessarily share the same cultural background in a context such as the courtroom. On completion of all data collection, the final chapters of this thesis will outline which theories may be adapted for improved communication between Indigenous speakers and legal professionals in the Victorian criminal justice system, to enable a more equitable outcome for disadvantaged Koories.

CHAPTER 5 METHODOLOGY

I Introduction

Linguistic theory informs this study which is interdisciplinary and empirical in approach, in order to more fully understand the effects of miscommunication on disadvantaged Indigenous offenders in the criminal justice system. This qualitative study diverges from the doctrinal theory-based research as often practiced in law research. The research aim is to identify the extent an awareness of cultural and language difference by participants in the Koori Court has on the outcome for a Koori offender.

This research examines the communicative process between Indigenous speakers and legal professionals in Victorian courts of law. Using an interdisciplinary approach, legal issues of courtroom discourse are examined through a linguistic lens, and linguistic issues through a legal lens. The way language is used in the context of the courtroom is observed to flesh out the reasons why people interact as they do when in a cross-cultural situation. This is necessary so that successful communication may be achieved between Aboriginal speakers and people working in legal settings.

The process and practice of the Koori Court forms the basis of this study, with the mainstream court used as the basis of comparison. The core inquiry is to identify to what extent communication is enhanced or inhibited in the Koori Court in response to the cultural and language disadvantage experienced by Koori offenders in the mainstream justice system.[1] As explained in Chapter 3, the jurisdictional scope of the Koori Court includes the process and practice of the court, with the same laws as are applied in the conventional court, but which differ in the scope of the court. The main aim is to achieve an appropriate sentencing option for the offender that is an alternative to prison (for a full explanation of the process and practice of the Koori Court, see Ch 3, VI B).

[1] In the adversarial mainstream court, the focus is primarily on determination of the facts to produce an outcome such as a sentence. A Koori offender may attend this court however the process is more formal and they must speak through their lawyer. To have their matter heard in the non-adversarial Koori court, although they must plead guilty, they are able to have a voice in the process and be part of the discussion.

The methodology involved field work in the form of attendance at a number of court hearings over the past six years, in urban, regional and city locations to observe socio-cultural and geographic variation. Semi-structured interviews were conducted with a number of Magistrates, Koori Elders, defence lawyers, prosecutors and court staff and these were audiotaped (unless a request was made to not do so). Selected court hearings were also audio-taped and transcripts made of those recordings. These were analysed using a sociolinguistic discourse analysis approach[2] in order to reveal any patterns of interest or variation in the language used between speakers. This data collection was further augmented by informal discussions with stakeholders in the justice system which provided further ethnographic material.

II Research Problem

Miscommunication in the traditional courtroom setting continues to be one of the barriers to justice for a Koori offender who comes into repeated contact with the law.[3]

Aboriginal Australians have experienced disadvantage since the early days of colonial settlement, and this is still a problem more than 200 years later.[4] Forced adoption of western values and restrictions on speaking their own language resulted in a breakdown of Indigenous language and culture, with continued disadvantage and discrimination. For many, this increased contact with the law and criminal justice system (as explained in Chapter 3).

Changes in government legislation have over time led to more punitive measures, and busy mainstream courts have no time to deal with underlying problems. In addition,

[2] What this means is that an adapted conversation analysis (CA) approach, using linguistic transcription conventions, is able to monitor conversational interaction and contextualization cues (many subtle) of discourse and speech acts of hearer and speaker in the courtroom, including overlapping speech and culture specific language. See Chapter 4 for full discussion of this approach.
[3] See Chapter 3 for further discussion of some of the difficulties experienced by Aboriginal Australians in formal courts of law.
[4] Cunneen, C and Tauri, J, *Indigenous Criminology* (2016), Policy Press, 45-46; Eades, D, *Courtroom Talk and Neocolonial Control*, (2008), Mouton de Gruyter, 4-6; Blagg, H, *Crime, Aboriginality and the Decolonisation of Justice,* (2016), Federation Press.

there is a hardening of community and government attitudes on crime and this has resulted in more Koories on remand and in prison, often for lesser offences.

The purpose of the research is to evaluate communication in the courtroom context of the criminal justice system, and identify any instances of disadvantage for a Koori offender. When there is a lack of awareness of language and cultural difference, miscommunication may occur, and this may lead to a miscarriage of justice and a cycle of reoffending.

III Research Review

A selective review of published literature on communication in the legal domain involving Aboriginal speakers was earlier explored in both Chapters 2 and 3, and in part of Chapter 4. All references to the literature reviewed are incorporated into the text of each chapter where applicable. Where possible, I draw upon Indigenous perspectives when examining the manner of criminal justice and how it is understood and administered. In earlier research I examined the increasing language diversity of participants in the legal system and how this diversity impacts on the communication process.[5] I examined a range of speakers from those with little or no English up to speakers of Standard English, to determine any changes in developments in response to the education and training of legal practitioners dealing with speakers with communication difficulties in the courtroom. As part of this current research, I bring my linguistic perspective to the topic and examine communication in the Koori Court within this continuum.

Professor Linda Tuhiwai Smith explores the intersection of two powerful worlds, the world of Indigenous peoples and the world of research.[6] Smith urges researchers of Indigenous peoples to follow practices that are more respectful, ethical, sympathetic and culturally appropriate, than in the past. Hudley, Mallinson and Bucholtz consider that there should be a rethinking of linguistic scholarship 'in more racially inclusive and socially just terms'.[7] They argue that 'to be adequate, a linguistic theory of race must incorporate the

[5] Stroud, N, 'Awareness of Language Diversity and Disadvantage in the Justice System in Victoria' (2004), Unpublished Honours thesis, Monash University, Melbourne.
[6] Smith, L, *Decolonising Methodologies: Research and Indigenous Peoples* (2012), (2nd ed), Zed Books.
[7] Hudley, A, Mallinson, C, and Bucholtz, M, 'Toward Racial Justice in Linguistics: Interdisciplinary Insights into Theorizing Race in the Discipline and Diversifying the Profession' (2018), in *Language, Journal of the Linguistic society of America.*

perspective of linguistic researchers of different methodological and racial backgrounds and must also draw on theories of race in fields such as anthropology and sociology'. I am mindful that as a non-Indigenous researcher, I can never really know the difficulties experienced by Aboriginal Australians in their struggle for their voices to be heard. However, I can attempt, with this research, to give them a voice in the justice system.

This study draws on scholarly investigation in linguistic and legal fields that has focussed upon difficulties of communication experienced by Indigenous Australians for more than forty years. It is intended that this documentation will be collated and made available at the conclusion of this study as a resource for access by researchers, government bodies, members of the Koori community, academics and students.

IV Research Plan

The research was conducted on a part-time basis, with a 3-fold approach:

- Observational case studies of hearings with access to audiotapes of selected hearings.
- Semi-structured interviews of participants for background understanding of culture and language.
- Detailed linguistic analysis of transcripts of court hearings and interviews (de-identified material) in order to identify significant linguistic features or sociolinguistic patterns (observed over time).

V Research Questions

This study addressed a number of research questions, for example:

- Does the informal and culturally sensitive Koori Court deliver on its aim of a 'fair go' for Indigenous offenders in comparison with conventional courts?
- If so, how do the redefined roles of participants at the court hearing impact on the process?

- Does the involvement of the community Elders in the administration of the law enhance understanding of Indigenous culture within the courtroom setting?
- To what extent can the Koori Court address the underlying issues behind the increasing number of Indigenous offenders in the Criminal Justice System?
- Is rehabilitation a long-term solution, and if so, what resources are in place for the follow-up of offenders?
- Has there been a change in the level of awareness of legal professionals through education and training regarding communication difficulties experienced by some Indigenous offenders in the courtroom?

VI Ethics

Ethics approval was obtained for this study from Monash University Human Research Ethics Committee in 2013, Application No. 2013001097. Due to initial Ethics limitations, Indigenous defendants were not interviewed at the start of the research. However, a further application was made and approval given by Monash Ethics in October 2016 for voluntary interviews (with material to be de-identified) with rehabilitated offenders as per Borowski (2009), with further reference to Marchetti (2014),[8] and this added more depth to the study. Together with semi-structured interviews with courtroom participants, this data provides an excellent reference point for further studies. Monash ethics principles embrace a collaborative and inclusive approach with any research involving the Indigenous community, and this has been complied with in all aspects of this study.

VII Selection and Location of Courts

From 2011 to 2017, the researcher attended a broad selection of Koori Courts and mainstream courts in regional, urban and metropolitan locations for a familiarisation with court proceedings and an understanding of differences in process, practice and formality

[8] Borowski, A, *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria 2009*, (2009) Victorian Law Foundation; Marchetti E, 'Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014), *Law and Policy*, 36,4.

of both conventional and alternative sentencing courts.[9] An additional factor was to observe any differences in geographic or socio-cultural variation in the language used in the courtroom. Courts attended were:

- Magistrates' Court, Melbourne (city court)
- Dandenong Magistrates Court (urban)
- Magistrates' Koori Court, Broadmeadows (busiest urban court)
- Magistrates' Koori Court, Shepparton (regional court – the largest Koori community in the state)
- County Court, Melbourne (city court)
- County Koori Court, Morwell (regional court)
- Children's Koori Court, Melbourne
- County Koori Court Melbourne
- Magistrates' Koori Court, Melbourne (established in 2014)

Methodology Adjustments

Due to the strict length requirement of the final thesis, a change in methodology was made to narrow the study down to the Magistrates' Court jurisdiction alone, so that a comprehensive comparison could be made between the adult Koori Courts chosen and the more formal mainstream court. A revised selection of Koori Courts and their geographic location in Victoria is listed below in Table 1.

Koori Court	No. of Cases observed	Geographic Location
Shepparton Magistrates' Koori Court	5	Regional
Broadmeadows Magistrates' Koori Court	54	Urban
Melbourne Magistrates' Koori Court	152	City

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· Table 1 – Court Location and Number of Cases observed in the Magistrates' Koori Courts

A further change in methodology was made with a decision to attend one court at a time for an extended period of a few weeks, before the researcher moved on to the next court.

[9] At the start of the research it was not possible to observe comparable instances between mainstream courts and the Koori Court as it was difficult to ascertain in the mainstream court whether a defendant was Aboriginal or not. A strict comparison also required a guilty plea. Data on the type of observation/interviewing done in mainstream courts therefore relied on published literature of comparable instances (Chapters 6 and 7 provide examples which demonstrate how the Koori Court compares with the formal mainstream court process and practice).

This was beneficial for the researcher, as it developed familiarity with court participants and the ability to follow one defendant over several hearings as the case progressed through the justice system. It also assisted in the establishment of trust of Indigenous participants and the recognition that the research could be of benefit to the local Koori community.

VIII Selection of Participants

Participants who indicated they were willing to be interviewed included:

- Magistrates/Judges
- Indigenous Elders and Respected Persons
- defence lawyers
- Koori Court officers
- other court personnel
- police prosecutor
- support service representatives
- Koori defendants

All interviewees were advised that the interview was confidential and names would be de-identified unless a specific request was made.[10]

Participants were divided into four groups, with a fifth group included after Ethics approval in October 2016.

Group 1 Magistrate or Judge.
Direct contact by email was made, explaining the project and inviting them to contribute to the research by taking part in a short semi-structured interview at a time and place suitable to them.

Group 2 Indigenous Elders and Respected Persons
Contact made firstly through the Koori Court Officer attached to the court for contact details and willingness to contribute to the study.

Group 3 Other Court Participants
Direct contact made with other court participants, such as legal professionals, Koori Court Officer, court staff, police prosecutor, corrections officer, support workers, case managers

[10] Corrections officers were willing to be part of the study but advice was received that they did not have permission to take part in this study.

Group 4 Other Indigenous community Elders
Direct contact with Indigenous Elders suggesting that an invitation be made to any additional interested Indigenous person that they are invited to contact the researcher to participate in the project. In this way, Indigenous people who do not have a role at the court, but may be keen to contribute, had the opportunity to do so.

Group 5 Koori Defendants who have passed through the court sentencing processes. This group was included in the study following Ethics Approval in October 2016. Contact was made for rehabilitated defendants through the Koori Court Officer, the case worker or their lawyer.

IX Data Collection

As articulated and outlined in Section IV of this chapter, data was collected using three methods, and included attendance by the researcher at many court hearings to observe the interaction and language used by participants in the courtroom; face-to-face interviews with court participants; and audio recordings of actual language used in selected court cases. All audio recordings were transcribed by the researcher.

Data collection methods include the selection of courts (Table 1); selection of participants (Table 2); observation at court hearings; and audio-recordings of face-to-face interviews with chosen participants. Data is transcribed using Scribe software and coded and classified to denote the number of the transcript and role of participant (see Table 3 which indicates transcript number and role of participant).

Data is analysed using a discourse analysis approach to examine responses of actual talk. Any interesting linguistic features or patterns obtained from the transcripts are then extracted and coded under broad categories with a subset of themes.

It was not possible at the start of the research to observe actual instances in the mainstream courts due to the inability of comparable instances (as the accused does not have to identify as an Aboriginal person). Data on language in the mainstream court therefore relied on access to comparable instances found in published literature on the difficulties experienced by Aboriginal speakers in the justice system, rather than quantitative coding and classifying of observed hearings. This is not considered detrimental to the core data and analysis of the thesis.

A *Observation at Courtroom Hearings*

During the course of the research, fieldwork involved attendance and observation by the researcher of more than 200 court hearings over a period of six years, in urban, regional and city locations. Observational case studies of hearings were carried out in selected Koori courts, and the process and practice of these courts were compared with that of the conventional court.[11] In the Koori Court, the researcher sat in the public gallery of the court, in full view of participants seated at the bar table. A comparison was noted between this court and the more formal conventional court.

Data recorded in notebooks detailed the date of hearing, number of cases observed and any interesting linguistic markers. As the researcher is proficient in shorthand, many of the quotes obtained were verbatim. Transcripts referring to the time and place of the quotes referred to in Chapter 6 (Presentation of Findings) of the thesis, are held in the data records of the researcher.

Types of offences heard in the Koori Court and observed by the researcher, included breaches of court order; failure to appear in court; driving while disqualified; using an unregistered vehicle; theft, breaking and entering; possessing controlled weapons; resisting arrest; drink driving; aggravated burglary; drunken and aggressive behaviour; or alcohol and drug problems.[12]

Additional observations gathered at each hearing detailed sentence outcome, whether a custodial or community-based order (CCO); if the offender was sent for rehabilitation; intended follow-up; and whether a prior offence had been recorded. A note was made as to what extent the linguistic communication impacted on the outcome, compared with a conventional court of law.

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[11] The Koori Court does not operate in place of the sentence hearing. Sentencing options follow the same procedure as in the conventional court. What is different is the inclusion of Aboriginal Elders in the sentencing process, and the interaction of all participants including the defendant in the 'sentencing conversation'. All may contribute to the discussion, but it is the Magistrate only who delivers the sentence. Sentencing options in this court allow greater scope for a restorative and therapeutic outcome for an offender who has met the criteria to have their case heard in the court (see Ch 3 VI for the type of offences 'heard' in the Koori Court).

[12] The Koori Court acknowledges that a defendant may need more time before the final sentencing. The judicial officer, while following precedent as in the conventional court, has judicial discretion to assess each case on its merit, taking into consideration any underlying factors behind the offence (see example in Chapter 6, II).

B *Face-to-Face Interviews*

The following table shows the number of face-to-face interviews conducted with a number of court participants, both Indigenous and non-Indigenous. The format of each interview was semi-structured, of 30-40 minutes duration, and held at a time and place suitable for the interviewee. An Explanatory Statement of the project was provided at the start of the interview (as per Ethics Approval requirements). This outlined the purpose of the research and possible benefits of the study to the legal system and the general Indigenous community.

Interviewee	Type of recording of interview		Total No. of Interviews	Koori Court Location
	Audio-recording	Notes		
Magistrates	4	4	8	Melbourne; Dandenong; Shepparton
Defence Lawyers	1	1	2	Melbourne; Broadmeadows
Court and Support Staff	3	2	5	Melbourne; Broadmeadows; Koori Court Manager
Defendants	1	1	2	Melbourne
Koori Court Officer	2	2	4	Melbourne; Broadmeadows
Police Prosecutors	1	1	2	Melbourne
Other -				
Other stakeholders – Judge Smallwood - AG Mr Rob Hulls		2	2	County Koori Court, Morwell, Melbourne

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- Table 2 – Type of Interview and Location of Koori Court

Permission was requested to use an audio-recorder for the interview, and the benefits of this was explained. A Consent Form was then given which gave the person a choice as to the use of the recorded interview and transcript and details of the storage of data. The proposed format of the interview was explained and confidentiality was assured. Participants were told they could withdraw from the interview at any time.

The researcher noted the date, time and place at the start of the interview, and thanked the interviewee for contributing to the study. This assisted in later transcription and cataloguing. Approximately three to five core questions were then asked about the way

language is used in the court, with the option to contribute any additional comments about their own experience.

A selection of interview questions included:

- *Is the legal language difficult to understand in the Koori Court? Please explain.*
- *To what extent are legal professionals in the Koori Court aware of cultural and language issues?*
- *In what ways do you observe communication is enhanced or inhibited in Koori Court hearings?*
- *To what extent does the Magistrate make sure that the accused understands what is being said? Please explain.*
- *Do you have anything else you would like to add?*

It was beneficial for the researcher to develop a trusting relationship of all participants prior to the interview, particularly Aboriginal Elders, court personnel and defendants. Over the years of the research, the researcher attended several Indigenous and justice conferences and informal gatherings, so built up an association with Magistrates, Aboriginal Elders and court staff who attended the courts during the years. At all times it was important to understand that as a non-Indigenous researcher it was necessary to always be respectful to all interviewees, to be aware of cultural and language differences, and to be clear in initiating topics for discussion. One of the ways this was achieved was to arrive early prior to the court hearing and speak informally with court staff and court participants, also to show an interest in the operation of the court.

In addition to the face-to-face interviews of participants above, the researcher had many discussions with additional stakeholders and court participants, also Aboriginal community members over the period of the research.

There were no risks anticipated for any interviewee who participated in an interview. Arrangements were in place to minimise any unforeseen circumstances, and emergency and counselling services' contact details were available at all times by the researcher.

C *Audio recording of Selected Cases*

Certain formalities must be complied with in the Magistrates' Court prior to carrying out audio-recording of selected hearings in criminal proceedings. To obtain a copy of a Court prepared digital recording, an application must be made to the Chief Magistrate and a fee paid. There are strict protocols on the use of the Court prepared audio-recording in CD form which may not be copied to another medium. This was not compatible with the chosen transcription software, so an in-depth linguistic transcription could not be made from those sources.

A request was then made by the researcher to the Chief Magistrate to use a personal audio-recording device to record proceedings, with its placement on the bar table at the time of the hearing. This was approved on the basis there were no objections from the presiding Magistrate on the day.

There were limitations with both the above methods of audio-recording, with difficulties regarding transcription. In the first instance, the Court CD enabled the researcher to observe a case that displayed interesting linguistic and interactional data and then make a request to the Court for the recording (but this could not be used with the software due to privacy considerations). In the second instance, when using a personal recorder placed on the bar table prior to the start of the case, it was unknown whether the case was linguistically relevant, or whether it would be brief or extensive.[13]

D *Transcription*

Several qualitative software packages were considered for transcription of audio recordings, including NVivo software, however for the purpose of this study, Express Scribe software was chosen as suitable for discourse analysis, in particular, adapted Conversation Analysis transcription. This software uses transcription conventions such as timed exchanges; length of pauses (in seconds); overlapping speech; paralinguistic

[13] By way of explanation, the process of the Koori Court is dynamic, and each case that comes before the court is unique and subject to change, depending on the interaction of participants around the table. There is no way of obtaining prior knowledge of the relevance and extent of the discussion.

activity (such as laughter); emphatic stress; or raised volume, all of which contributed to an in-depth analysis of language and interaction.[14]

Written transcripts of criminal court proceedings were not available from the Victorian Government Reporting Service, and were not considered useful for this study as detailed linguistic analysis could not be made on a regular transcription.

All audio-recordings of interviews and court cases for this study were transcribed, coded and dated chronologically, as shown below on the spreadsheet example. Coding denotes the number of the transcript and role of the participant, (for example T1 (M)), followed by the date and type of interview/court case. All transcripts are referenced in the footnotes in my Findings Chapters 6 and 7 according to the topic.

Code No.	**Name**	**Position**	**Date**	**Type**	**Audio/Notes**
T1 (M)	x	Magistrate	Date	Interview/case	Audio/notebook
T2 (L)	x	Lawyer	Date	Interview/case	Audio/notebook

Table 3: Coding for Data Collection of Interviews and Court Cases

In addition, a Master copy of all court cases attended by the researcher is retained in a folder which notes the book number in which the court hearing has been recorded, the date and time, name and location of the court, participants, and any interesting observations or notable linguistic patterns in the discourse. Due to the sensitive nature of the study, all names are de-identified.

X Analysis of the Data

The methodology undertaken for analysis of interview and observational data is appropriate and thorough. Rather than quantify how much or how often something occurs, this study is more concerned with how things happen and what they might mean.

[14] Following the analysis, when citing the responses of participants in my Findings Chapters 6 and 7, transcription conventions follow the guidelines according to the Australian Guide to Legal Citation, (3rd ed, 2010), 12-15.

As explained in the Indigenous research methodology in Chapter 1 and Chapter 4, it is rigorous and justifies the conclusion. The feedback obtained during the course of this study is that it is a valuable contribution to knowledge in this field.

Systematic coding is thorough and defensible. Each interview or court case is dated, the court named, Magistrate named, and any interesting data of the case recorded. When referenced in the thesis, name and title are coded, for example Transcript T10.1 (O) refers to participant number, line number of transcript and 'O' meaning Koori Court Officer. These are colour coded for use under one of the four themes.

Examples and case studies provided in this thesis substantiate the four themes of the study which exemplify the work of the Koori Court, such as cross-cultural aspects; importance of the courtroom context in the culturally aware Koori Court; and the communicative interactive style of the 'sentencing conversation' which allows the Koori defendant a voice in the court system.

Analysis is undertaken and discussed throughout the thesis under specific contexts, in particular in the case studies of Chapter 6 and the thematic analysis of transcripts of interviews and court hearings in Chapter 7. Data is analysed by way of systematic coding and classifying which informs my analysis and choice of examples. All this is buttressed by case studies to provide the in-depth understanding.

Table 3, in IX, D, provides an example in the chapter, demonstrating the coding of examples using transcript number, roles of participant, date of transcript, whether an interview or court case, and whether recorded with audio-recording or notebook.

Interactional sociolinguistics was chosen as the optimal theoretical framework for analysis of the data when comparing the process and practice of the Koori Court with the mainstream court. In order to elicit the complexities of cross-cultural discourse in the legal domain, audio recordings of discourse in the courtroom and in interview were transcribed and analysed under broad linguistic categories with a subset of themes.

A *Analytical Framework*

The overarching term I use in the study of language in the legal domain is that of Forensic Linguistics as explored in Chapter 4.[15] I use an interactional sociolinguist approach, following the work of anthropologist and linguist John Gumperz,[16] and draw in part on comparative law, informed by ethnography of communication.[17] I examine the cultural dimensions and context of language and interaction in the legal domain to identify any cross-cultural language features which may cause miscommunication in the courtroom.[18]

B *Processing of Documentation and Interviews*

Data was analysed using a discourse analysis approach to examine responses from transcriptions of face-to-face interviews and audio-recordings of actual case hearings. Any interesting linguistic features or patterns obtained from the transcripts were extracted and coded under a number of broad categories, with a sub-set of themes.

Language Category	Sub Themes	Responses
		See Chapters 6 and 7
Pragmatic features	Formality, assumptions, attitude, non-verbal language, use of silence, lowered gaze, culturally specific gestures, respect	
Communicative style	Legal register, cultural differences, question/answer format, notion of time and place, lexico-semantic meaning of utterance,	
Cross-Cultural aspects	Cultural assumptions, interactive, subtle responses, cooperation, differences of politeness, habits, kinship obligation, unconscious linguistic conventions, bi-cultural ability, aboriginality	

Table 4 - Thematic Analysis of Data

[15] The term 'forensic linguistics' is now accepted as a cover term for language and law issues, and my thesis specifically examines the alleviation of disadvantage produced by language in legal processes. See Gibbons, J, *Forensic Linguistics: An Introduction to Language in the Justice System* (2003), Blackwell Publishing.12.
[16] Gumperz, J, *Discourse Strategies*, (1982), Cambridge University Press.
[17] See Chapter 4 for a discussion of the analytical framework used in this study.
[18] An example of some of the communication difficulties that could arise in the mainstream courtroom context could include an assumption of language competence by legal professionals; the formality of the legal register; ideological differences; cultural and language differences; differences in the communicative style of speaking; a lack of shared knowledge; or an imbalance of power in the courtroom.

XI Limitations of this study

There were a number of limitations arising in the method of this study. One limitation was initially the issue of availability of audio, written or video court transcripts for analysis. The Victorian Government Reporting Service were approached for copies of transcripts but these were not forthcoming. Thus the researcher had to undertake the recording of cases (where approved) on personal visits at each court hearing utilized in this study.

The time factor also limited this study, however the research aims were achieved within the required time and with the available resources. It was intended to conduct observations of court hearings over a period of approximately 3-5 years, to allow the remainder of the time for analysis and findings, however additional interviews with defendants became available towards the end of the data collection period and this extended the time frame.

It was clear that the focus had to be narrowed to Victorian courts only for the purpose of this study, however other Indigenous sentencing courts throughout Australia were referred to briefly in the thesis for comparison.[19]

There was also a limitation on the *types* of cases heard. In order to compare both mainstream and Koori courts, collection of data from court hearings and case studies was narrowed to include only offenders who plead guilty to a charge, because the Koori Court only hears these sentencing hearings. As all cases heard in the Magistrates and County courts could be heard in the Koori Court except for family violence and sexual offences, this factor also had to be applied to cases observed in mainstream courts.

[19] A number of Indigenous Courts were established throughout Australia to re-dress the problem of over-representation of Indigenous offenders in the criminal justice system following recommendations made by the Royal Commission into Aboriginal Deaths in Custody,1991. In addition to the Koori Court of Victoria, these include the Nunga Court in South Australia, the Circle Sentencing Court in New South Wales, the Murri Court in Queensland, also Indigenous courts in Northern Territory and Western Australia. See also Chapter 3,1 of this thesis.

A further limitation at the start of this study was the inability to hear first-hand the personal stories of rehabilitated offenders, as this was considered an important part of establishing understanding of communication. The focus remained for several years on observation and transcripts of court hearings and interviews with court participants other than defendants.

Although only a small number of offender interviews could be conducted due to the delayed Ethics approval for defendant interviews, a greater number of other participants, court staff and additional stakeholders with an involvement in the Koori Court hearing were able to be interviewed. This gave a good insight into the overall workings of the process and practice of the Koori Court, and the way participants interacted with the defendants.

The impact of the above limitations may have contributed to a delay in the early collection of data to some extent, however even with these limitations, what we can see from the study is that the alternative sentencing Koori Court is a valuable forum for Aboriginal people to have a voice in the justice system.

The consequences of all these limitations were not insurmountable, and most of the above matters were accommodated.

XII Some Additional Practical Matters

One unintended consequence of the part-time study was that the extended period of the research covered many changes in government legislation, court administration and community attitudes. On the one hand, this gave a broad overview of changing government and public attitudes to Indigenous issues, enabling a wide cross-section of court hearings and variations in the collection of data. On the other hand, changes in court procedure and court personnel over that time somewhat affected the continuity of the study.

Observations of court hearings were carried out over a period of approximately 6 years, to allow the remainder of the time for analysis and findings. At the start of the research,

there was an inability to hear firsthand many of the personal stories of rehabilitated offenders but this was later addressed by additional Ethics clearance.

The focus was, of necessity, narrowed to Victorian Magistrates' Courts for the purpose of this study, however additional Indigenous sentencing courts in Victoria and throughout Australia were referred to for comparison. Comparable data for mainstream courts unfortunately could not be obtained as statistics were unavailable at the time regarding Koori accused who had plead guilty in the mainstream court. This may now be available.

Another outcome of sentencing in the Koori Court was the reinforcing of the role of Elders and respect for them in the community. The unintended consequence was the extent to which the Koori Elders embraced their role in the administration of justice. Involvement of Elders and the community is one of the main tenets of the Koori Court to ensure reconnection of rehabilitated Koories with their family and local Indigenous community. Additional Aboriginal people are now taking up a variety of roles in the criminal justice system.

The aging of Koori Elders is an immediate problem, however measures are in place for the training of younger Koori Elders such as the Elders Training Program (ERP), in addition to several other mentoring programs in the developmental stage.[20] Rehabilitated defendants are also encouraged by Magistrates and Koori Elders to become mentors to young Koories in their community.[21]

One unexpected consequence revealed over the period of the research was that the Koori Elders became much more confident at the court hearing. Over the period of the research, Elders gained authority and expertise and were much more confident in the legal domain.

Elders initially described their early days in the Koori Court as being quite stressful. This was a time when there were some negative comments made by both those within the criminal justice system, the public, the press, and even some Aboriginal Australians, that

[20] Aboriginal Justice Agreement Phase 4, *Burra Lotjpa Dunguludja* (2018), Victorian Department of Justice.
[21] During one court hearing, one Elder was heard to exclaim to the defendant 'You should be sitting THIS side of the table.

there should not be an alternative sentencing system for Aboriginal offenders. Some Elders also stressed that they were not in favour themselves to start with, but after becoming more familiar with the court process, they were much more positive, and felt they were able to provide authority and cultural knowledge to help the Koori offenders get back on track.

One unintended consequence for the researcher was the difficulty to hear soft voiced speakers in the conversation when sitting in the public area of the court. There was no resolution of this problem. A further early problem was difficulty to access good quality tapes from the court. However, court approval to bring my own audio-recorder to the court overcame this difficulty.

There were some difficulties in arranging interviews. Dates were agreed then cancelled. Interviews promised – several emails sent but no reply. When cultural factors were understood, including the Aboriginal way of saying 'yes' but only meaning 'yes I'll consider it',[22] a date would be finally arranged.

The time factor was also a problem for this study, however research aims were achieved within the required time and with the available resources. Any limitations were not insurmountable.

XIII Conclusion

This chapter has endeavoured to show the approach taken in this study to examine the communicative process between Indigenous speakers and legal practitioners in Victorian courts of law. It outlines the research problem of miscommunication which may occur for Aboriginal offenders in mainstream courts of law, and compares this with communication in the Koori Court of Victoria. The analytical framework of interactional sociolinguistics is discussed, together with the collection of data and the processing of the documentation

[22] Refer to Chapter 4 of this thesis for an explanation of 'gratuitous concurrence', which is often a cultural factor used by Indigenous speakers who have a different form of meaning for the word 'yes'.

of court hearings and interviews in order to understand the language and interaction of all participants involved in the court hearing.

Chapter 6 follows, with a presentation of the findings of the study, which introduce a human face to the court process. These findings present some of the personal stories of Indigenous Australians who find themselves in the criminal justice system but feel that their voices are not heard in the formal legal domain.

CHAPTER 6 VOICES FROM THE COURTS

Presentation of Findings

I Introduction

As explained earlier, the aim of this study is to address a number of research questions on the extent to which communication is enhanced in the Koori Court.[1] My observations and the responses from interviewees, seek to show the impact communication in the Koori Court setting has on a Koori offender.

There have been many changes in the criminal justice system in Victoria over the span of this research.[2] Government legislation as a response to a 'tough on crime' community attitude have led to changes to sentencing and bail laws and an increased police force and the building of more prisons.[3] An increase of drug use in the community is also a significant and ongoing problem.[4] A large number of alleged offenders are currently held on remand, and the court system and prisons are currently overloaded.[5] Magistrates are struggling to cope with rising caseloads, and now hear cases at night and on weekends.[6]

The less formal process of the Indigenous Koori Court allows for an accused person to have a voice in the court, with all seated at the table at the court hearing willing to listen to their story. In this way, the Court hears a wider range of factors relevant to the case which may not normally be revealed in a busy mainstream court. In this court, when the Koori Elders, seated either side of the Magistrate, ask the accused person to take

[1] See Chapter 5 Methodology for a list of the research questions which guided this thesis.
[2] Legislation introduced into Victorian Parliament during this time included changes to baseline sentencing, the introduction of mandatory sentencing and the fixing of a non-parole period. On 16 April 2013, the decision was made to abolish all remaining suspended sentences in Victoria. Also refer to the Sentencing Advisory Council Baseline Sentencing Report, May 2012.
[3] *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters)* Act 2013 (No.32 of 2013) enacted as part of the Victorian Government's 'tough on crime' policy.
[4] *Trends in Minor Drug Offences Sentenced in the Magistrates' Court of Victoria*, Sentencing Advisory Council Report, June 2018, 31.
[5] Carey, A, 'Remand prisoner numbers soaring', *The Age* (Melbourne), 12 July, 2018, 11.
[6] Towell, N and Cooper, Adam 'Bid to ease stress of Magistrates' lives' (2017), *The Age* (Melbourne), 25 November, 2017, 14. 'Chief Magistrate Peter Lauritsen has said his colleagues were hearing cases at night and on weekends as the system struggled with the soaring numbers of alleged offenders being held on remand'. See also Magistrates' Court of Victoria Annual Report 2017-2018, 6-7.

responsibility for their actions, the engagement of the accused may have a positive impact on the outcome of their case.

Following consideration of all the factors outlined in previous chapters involving issues of language and cultural disadvantage experienced by Koori offenders in the criminal justice system, this chapter brings together some of the findings and case studies which show the way the Koori Court can bring about change in the life of a Koori offender.[7]

Section One of this chapter, entitled 'Voices from the Courts', introduces the human face to the court process and provides an overview of the chapter which will present some of the personal stories of Aboriginal Australians who are caught up in the criminal justice system.

Section Two of this chapter draws together all the material gathered for this research to show the part the Koori Court plays in the justice system. The section is divided into three subsections. Firstly, Section A compares my observation of both mainstream and Koori Courts, noting any differences in the process and practice of these courts; secondly, Section B outlines the impact that the redefined roles of participants in the Koori Court have on interaction in the courtroom; and lastly, Section C includes selected case studies which show some personal experiences of Koori defendants as they pass through this court. Interviews conducted with participants support my recordings and observations, and give a background to the study.

The chapter concludes in Section Three with a reflection on the way the chapter has brought to life some of the voices which are heard in the Koori Court. It demonstrates how this court is a forum for disadvantaged Indigenous people who find themselves caught up in the justice system, but who now have a voice. Unless attention is paid to issues of homelessness, medical and mental health problems and drug and alcohol abuse, which often have led to an offence, the courts can only do so much to bring about change. The aim of the Koori Court is to bring about therapeutic change in the life of the Koori offender and to link them with support services and reconnect them with their

[7] See Chapter 1 Introduction for an explanation of the terminology chosen for this thesis when referring to Indigenous Australians. The term 'Koori' refers to an Indigenous person from the south east area of Australia.

culture.[8] My findings regarding the way communication is enhanced between participants exemplify the work of this Court.

The chapter emphasises the significance of this study in bringing an awareness of cultural and language difference to all participants involved in the criminal justice system as a whole.

II Processing Of Documentation and Interviews (Voices from the Courts)

The primary focus at the beginning of the research project was to observe a wide selection of court hearings in both Magistrates' Koori Courts and County Koori Courts. I attended more than 200 court hearings over a period of six years in regional, urban and city locations, with additional discussions with stakeholders from the courts, support services and community. As explained in Chapter 5, the selection of courts was narrowed to the Magistrates' Court jurisdiction, with a small number of County Koori Court hearings (CKC) for comparison.

Location of Koori Court Hearings from 2012-2017	**Total no. of matters observed**	**Types of Offences**	**Types of Sentences**
Broadmeadows KC	54	In the Magistrates' Court - aggravated burglary, assault, theft, robbery, recklessly endangering life, breaches of court orders, driving offences, using an unregistered vehicle, drunken and aggressive behaviour	In the Magistrates' Court - Community Correction Order (CCO) Judicial monitoring Adjournment Rehabilitation Custodial sentence
Melbourne KC	152		
Shepparton KC	5		
Dandenong Court	1		
Morwell CKC	6		
Melbourne CKC	3		
Total	**221**	In the County Koori Court, more serious offences are heard	In the County Koori Court, a more serious offence would incur a more serious sentence

Table 1 – Location of Koori Courts and number of matters observed

The matters listed in the table above, are expanded to give a breakdown of Koori Court cases observed and interviews with participants involved in court hearings.

[8] For further information, see Winick, B and Wexler, D *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003), Carolina Academic Press.

Location of Koori Court Hearings from 2012-2017	Court Cases audio-recorded and transcribed	Notes taken of selected Court Cases	No. of Participants interviewed	No. of Interviews audio-recorded	Notes taken at Interviews
Broadmeadows KC	-	54	7	3	4
Melbourne KC	9	152	10	8	2
Shepparton KC	-	5	3	-	3
Dandenong Court	-	1	1	1	-
Morwell CKC	-	6	1	-	1
Melbourne CKC	-	3	-	-	-
Total	**9**	**221**	**22**	**12**	**10**

Table 2 – List of Transcribed audio-recordings and Notes taken at Court Cases and Interviews

In almost all of the cases observed in the courtroom, the informal and culturally sensitive process and practice of the Koori Court enabled the defendant to tell their story in the presence of their Koori Elders and receive feedback on how they could change their life and stop the cycle of reoffending. The presence of Koori Elders from the local Indigenous communities was reported as an important factor in the process, as they imparted local cultural knowledge and an Indigenous speaking style to proceedings. At one or two hearings, although the option was given, the defendant elected not to speak and left it to their lawyer to tell their story. This was a rare occurrence, and was respected by participants.

A *Comparisons Observed between Mainstream and Koori Courts*

Koori Court interior

Melbourne Magistrates' Court - Magistrate at the Bench

A marked difference was consistently observed between the more formal mainstream court and the alternate-sentencing Koori Court process, when an understanding of cross-

cultural difference was shown by legal practitioners. A key differentiating factor between the two courts is how in the formal mainstream court the Magistrate and lawyers operate according to their own defined role in the adversarial system, whereas in the Koori Court, they are much more interactive and part of the 'conversation'. However, over the period of my research, a gradual change in cultural awareness in some hearings in the mainstream court was observed which resulted from the cross-over of some culturally aware Magistrates who sat in both mainstream and Koori Courts.[9] This occurred in spite of there being much less time to hear cases and interact with defendants.

Each day in the Koori Court is different. As one approaches the courtroom, lawyers can be seen huddled outside the court with their clients going over last minute matters of the case. Some days there may be 10 or 11 matters to be heard, while on other days, perhaps only three or four. The public area of the courtroom may be crowded at times, while at other times the only people waiting for their matter to be heard are the defendant and their lawyer.

The first difference in the process of the Koori Court is when the registrar announces the case and the Magistrate enters the courtroom together with Koori Elders and the Koori Court Officer and all take their place at the bar table. This differs from the mainstream court, where all parties and officials are in court prior to the Magistrate entering. In the Koori Court, this is a very powerful symbolic message about the role and status of the Koori Elders.[10] Those already seated in the Court are not required to stand, as in the mainstream court, and honorifics are dispensed with.

In the Koori Court the defendant is called to the bar table and is seated directly opposite the Magistrate and Koori Elders. If the defendant is currently in custody, then the Court waits for them to be brought from the holding cells. There may be delays in the transfer of prisoners from prison to the court, and this may delay the day's proceedings. This is a

[9] Stroud, N, Paper presented at the Aboriginal & Torres Strait Islander Legal Research Workshop, 9-10 February, 2017, Sydney University Law School.
[10] In his evaluation of the Children's Koori Court, Borowski also notes this powerful message about the respect shown to Koori Elders. In Borowski, A, (2010) *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria* (2010), Victorian Law Foundtion.

current difficulty and impacts on the efficiency of the court.[11] Unfortunately the issue has persisted due to the increased number of people in the prison system and in spite of an increase in the number of audio visual links ordered by Magistrates.[12]

Upon arrival, the defendant walks through the door leading from custody, together with two guards, and sits at the table. Any family or support person then takes their seat on the left of the defendant. If there has been a problem of drug abuse, the accused may not come in contact with family members to prevent the passing of banned substances.

The Magistrate begins proceedings by welcoming the defendant by their first name and introducing them to all seated at the table. At the start of each hearing, the Elders often ask the defendant 'who is your mob?' They try to establish a connection. This is a marked difference to the mainstream court where the defendant is formally addressed for example, as 'Mr. Andrews', and sits isolated in the dock.

The following table shows some differences in process and practice between conventional courts and the Koori Court.[13]

Conventional court	**Koori Court**
Formal	**Informal/Culturally Aware**
Judge or Magistrate sits at a high bench – symbol of power and prestige	Judge or Magistrate sits at oval table with all participants. The legal system is adapted to acknowledge the needs of Aboriginal participants
Formal legal language and in-group 'legalese'	Informal, culturally aware language
Question/Answer format with defendant's lawyer speaking on their behalf	'Sentencing Conversation' format with all participants seated around oval table and able to join in the conversation

[11] Hall, Bianca, 'Prisoners missing court because of jail overcrowding', *The Age,* 11 March 2016, 7. (My personal experience of this occurred at one day of hearings when the whole court sat and waited for more than 30 minutes for Corrections to bring the next person from custody as the cells were full and they had to bring them from another prison).
[12] Magistrates' Court of Victoria, Annual Report, 2015-2016, 4. See also Magistrates' Court of Victoria, Annual Report 2017-2018,16, which highlights an increased number of matters now heard, following an expansion of audio-visual links in the court system.
[13] Stroud, N, 'The Indigenous Koori Court: Challenging Linguistic Conventions'. Paper presented at the 13th Biennial Conference of the International Association of Forensic Linguists, 10-14 July, 2017, Porto, Portugal.

Visible police presence in court	Limited police presence
Offender may not understand proceedings	Frequent checks to ensure offender understands
Offender mostly silent, seated in dock	Offender seated directly across from Magistrate and Indigenous Elders of their community – direct eye gaze and accountability
Barrister/defence counsel may not know many background details of the defendant	Defence Counsel has background knowledge and may meet with client several times prior to court
Formal roles of participants in court	Redefined roles of participants – more culturally aware, have an impact on the process
No involvement of Indigenous Elders	Involvement of Indigenous Elders – brings cultural knowledge and respect to proceedings
Underlying issues behind the offence may not be heard in the court due to lack of time	More time taken to hear any underlying issues behind the offence
Sentencing considerations: Just punishment; deterrence; rehabilitation; denunciation; community protection	The Judge or Magistrate considers all the underlying factors behind the offence, and considers suitability for rehabilitation before passing an appropriate sentence
Programs for rehabilitation – CISP,CREDIT/Bail Support program, Diversion	Alcohol and drug rehabilitation, anger management, Community Correction Order (CCO), Wulgunggo Ngalu Learning Place (if drug free and on CCO), Judicial monitoring, programs to reconnect offender to Indigenous community, support of CISP

Table 3 – Comparison between two Victorian Court Systems

The Figure below is reproduced from Chapter 3 to emphasise that the seating in the Koori Court is an interactive and cooperative space where all may have a voice at the table.

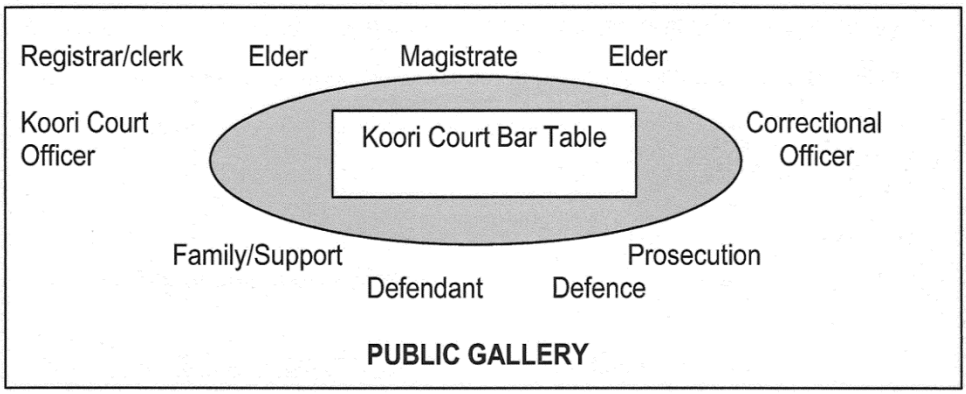

Figure 1 - Seating plan in the Koori Court

The less formal layout of the Koori Court draws attention to the fact that all are equal in this court.

Koori defendants who come to this court say that they feel comfortable. One defendant reported that it is a place where they can come and 'have a yarn' with their Koori Elders.[14]

> In the mainstream court (…) to them it's a business (…) whereas in the Koori Court it's personal, and they're not just dealing with a number – they're dealing with their own kind[15]

This does not negate the fact that they will be held accountable for their actions, but it is a place where they can work out a way to address the issues underlying their criminal behaviour.

As one Koori Court Officer says

> We try to make it as safe and as welcoming as possible and make the client feel as comfortable to actually speak of their story[16]

This is not the case in the more formal mainstream court, where the defendant sits alone and passively in the dock and speaks through their lawyer, who due to the design of the court has his back to his client. There is also a much more visible police presence in this

[14] Transcript T9.34 (D).
[15] Ibid.
[16] Transcript T10.81 (O).

court which may be intimidating for an Indigenous defendant, (as it is for all defendants).[17]

In the Koori Court, the Magistrate holds a pre-court meeting prior to the hearing which allows time to discuss the case with the Koori Elders before the 'sentencing conversation' is held. This also allows the Elders to obtain additional information and contributes to their understanding of the case.

There is a marked difference in the way language is used in the Koori Court. In most cases observed, legal language was dispensed with unless there were specific legal terms used in reports which were read out. The Magistrate usually explained a problematic term to those seated at the table. Time was allowed for people to speak, and in this way, the accused was more likely to tell their story. Also those at the table were more likely to take the time to consider a point before speaking, and this was accepted. Silence was respected. This is consistent with the Aboriginal English style of discourse.[18]

The presence of Koori Elders and other Koori court staff also meant that the Indigenous speaking style was evident in the conversation.[19] For example, I observed the Magistrate greeted the first defendant in court one day, by saying 'You're looking particularly 'deadly' today Andy!'[20] This caused everyone in the courtroom to laugh and appreciate that the defendant was not afflicted with a terminal disease, and that the Magistrate was suitably conversant with the popular slang often used by Aboriginal youth meaning 'awesome', or 'great'. It was apparent that the tenor of the courtroom felt relaxed and 'safe', and then the main business of the day began with co-operation from everyone.

B *Redefined Roles of Participants in the Koori Court*

One of the key features of the Koori Court process is the interaction of the participants at the 'sentencing conversation'. This is in marked contrast to the formal process in the

[17] Cunneen, C and White, R, *Juvenile Justice: Youth and Crime in Australia* (3rd ed, 2007), Oxford University Press, 149.
[18] Eades, D. *Courtroom Talk and Neocolonial Control* (2008), Mouton de Gruyter, 107-109.
[19] The Indigenous speaking style is discussed in detail in Chapter 4.
[20] Transcript T19.1 (D).

mainstream court where participants have pre-defined roles observed over time in all western legal courtrooms.[21]

Chapter 3 of this thesis discussed the operation of the Koori Court in detail.[22] The research shows that the reduced formality for those seated around the table in the body of the Court encourages the defendant to be part of the conversation.

The following table broadly outlines some of the main roles and responsibilities of each participant in the courtroom, together with an observation of roles.

Position	Role / Responsibility	Observation
Magistrate	Follows the law as in mainstream court, but after consideration, and with background knowledge, is able to pass an appropriate sentence.	Judicial monitoring of defendant's progress - increases participation and return to court.
Defendant	Now has a voice in court; is able to tell their story; feels supported	Can have attitudinal change.
Elder A	Brings cultural knowledge to the conversation.	Often knows family of defendant, 'be proud of your heritage', 'stop reoffending', 'make something of yourself'; encourages reconnection with culture
Elder B	Supportive but stresses change in behaviour needed.	Often tells own story of disadvantage and how this was overcome.
Koori Court Officer	Liaises between the Elders, Magistrate, defendant and defence lawyer.	Has an understanding of the background of the defendant.
Police Prosecutor	Engages well – gives good advice.	Shows good side of policing. Some police are very aware.
Defence Lawyer	Represents their client in the court.	VALS lawyers good, others may not engage fully, depending on familiarity with Koori court
Support – CISP	Provides follow-up support for defendant.	CISP support very good. Is able to provide defendant with strategies for behavioural change.

[21] King, M, Freiberg, A, Batagol, B, and Hyams, R, *Non-Adversarial Justice* (2009), The Federation Press, 1-3.
[22] See Chapter 3 Section IV for further information on the operation of the Koori Court.

Family/support	Very important for family or support person to be present.	Enables future successful rehabilitation.

Table 4 – Redefined Roles of participants in the Koori Court

The remainder of the section draws upon the voices of the main participants who sit in the Koori Court to demonstrate the very issues that arose from the research.[23]

1 *Judicial Role*

The role and behaviour of the judicial officer in the Koori Court is the main initiator of change in the way people interact and communicate during the Koori Court hearing.[24] This compares with largely uninvolved judicial officer in the more formal mainstream adversarial court.[25] As mentioned earlier in this thesis, the first Magistrate to preside in the Koori Court, Kate Auty, coined the phrase a 'Sentencing Conversation' to describe the more open and continuous communication which occurs in this court, based on mutual respect.[26] This supports my contention that the process is effective when the judicial officer is mindful of the well-being of those involved.[27]

All Magistrates in the Koori Court follow the same legal processes as in the mainstream court, and sentencing outcomes must be strictly adhered to according to the law.[28] Magistrates make it clear that they alone are responsible for sentencing, not the Elders. This is an important part of the process as it reduces the likelihood of repercussions to the Elders in the community about the decision made.[29]

[23] To preserve the privacy of individuals, pseudonyms are used in this chapter, and direct quotes are de-identified.
[24] In the Koori Court, the judicial officer is the Magistrate.
[25] King, M, 'Judging, judicial values and judicial conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts' (2010), *Journal of Judicial Administration*, 19, 133.
[26] Briggs,D and Auty, K, 'Koori Court of Victoria: Magistrates' Court (Koori Court Act 2002)'. Paper presented at the Australian and New Zealand Society of Criminology Conference, Sydney, October 2003.
[27] King, M, 'Judging, judicial values and judicial conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts' (2010) *Journal of Judicial Administration,* 19, 133.
[28] Ibid.
[29] Transcript T3.26 (M).

Certain Magistrates have presided at hearings in Koori Court for many years, some since its inception. One Magistrate commented that 'the more that the offenders talk directly, the more we learn about not just their lives, but Koori life, and the more we learn about more effective communication'.[30]

However not all Magistrates exhibit the same enthusiasm for changes to the process. One of the lawyers, in answering my question about the operation of the Koori Court, made the comment that some Magistrates who sit in the Koori Court have the attitude that 'this is my court – I run my court', and are not so willing to accommodate changes. His comment was that

> you have to let go a little bit in the Koori Court, it's still the Bench's court, but it's more of a cooperative situation.
> So I think that as Magistrates sit in there longer and longer, they get better and better.[31]

Magistrates who sit in both formal mainstream courts and Koori Courts and who demonstrate cultural awareness, can have a positive impact on communication in both courts.[32] One Magistrate observed that when she presides over a case in the mainstream court which involves an Aboriginal offender, she begins the case asking 'Are you related to the ('family name') in (regional country town)? She tries to establish connections and involves the defendant in the hearing.[33]

Another Magistrate has a similar approach. When she goes into mainstream court, she asks the legal counsel 'do you mind if I speak to your client directly?' She makes sure the client is included because sometimes they can be forgotten, as they are usually only heard through the voice of their counsel.[34] This Magistrate also said that in either court, she would never insist on eye contact with the defendant.[35]

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[30] Transcript T29.6 (M).
[31] Transcript T14.52 (L).
[32] Transcript T3 (M).
[33] Transcript T29.36 (M).
[34] Transcript T3.60 (M).
[35] Ibid. This demonstrates that there is no fixed answer to the question of eye contact or lowered gaze that arises in discussions on Indigenous non-verbal communication. It appears to not only vary between Indigenous communities throughout Australia, but also between local Indigenous family groups. Some interviewees suggest that a lowered gaze is a sign of respect, while others suggest that it stems from colonial days when in contact with a more powerful speaker.

On the question of understanding,[36] the same Magistrate said that in the mainstream court, the lawyer might well say that their client understands the process, but in the Koori Court, she asks the client directly to explain what they understand the orders to be, and then gets a much better knowledge of how much they understand. She explained

> I'm the one imposing the sentence - I'm the one imposing bail conditions - I need to know that they understand what I've said. Not what the lawyer might interpret[37]

Similarly, a different Magistrate observed the importance of body language and its value in communication in the Court.

> I'll ask them like 'what do you think about that' or 'so what do you think you need to do before the next date?'. Because often with Koori Court they're asked to do things – you have to go to do a program or see someone and they have to do these things before the next date. So before the end, I'll say 'what's your understanding of what you need to do next?[38]

This Magistrate observed that some of the people who come to Koori Court are very disempowered and disenfranchised. She suggested the following:

> It would be good if there was a little DVD that people could watch while they are waiting for their case to come on the day, that has a mock Koori Court to explain what happens and 'this is what you might be asked to say', and gives examples and shows how it all works.[39]

The following case observed one day in the Koori Court exemplifies the way communication may be facilitated between the Magistrate and all participants:

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[36] Ibid. The legislation actually requires that the court be conducted in a manner with as less formality as possible to ensure that the accused understands. Magistrates' Court (Koori Court Act 2002) (Vic).
[37] Transcript T3.60 (M).
[38] Transcript T1.87 (M). This exchange, recounted by a Magistrate regarding her interaction with a Koori defendant, demonstrates the importance of the body language of a defendant. In this case, the defendant showed remorse for his actions and shame at what his father would have thought of him. After hearing his story, he was given a second chance, but was told that if he got into trouble again, he would have to serve the full sentence. In a similar instance in the mainstream court, the matters would proceed to the sentence and possibly prison
[39] Transcript T1.58 (M).

> The accused, a young man in his twenties, on a charge of alcohol related assault, entered the courtroom with a confident stride and sat at the table opposite the Judicial Officer and the Elders. By the time the Elders had spoken about the shame he had caused his family and the community because of his alcohol and drug problems, his body language had changed. As he told his story, the court heard of a life coping with disability, low literacy skills, crowded housing and sadness at the death of his father. He showed remorse at his actions, and shame when thinking of what his father would have thought of him. He vowed to turn his life around. The court then heard from participants at the hearing, such as the Koori Court Officer, the Drug and Alcohol Counsellor and family members, and a decision was made regarding available courses the offender could attend, with a work component and follow up support services. He was given a deferred sentence so that he could attend rehabilitation, with the instruction that he would have to serve the full sentence if he got into trouble again. The Judicial Officer concluded the case by acknowledging the collaborative input of participants and noting that the absent victim should also be remembered.[40]

2 *Role of the Elder and Respected Person*

The participation of Koori Elders at the court hearing is one of the main tenets of the Koori Court process. In comparison, there is no designated role for Indigenous Elders or community members in the mainstream court.

In the Koori Court, Koori Elders and Respected Persons often have a personal knowledge of the offender. This is especially so in regional community areas. In the busy urban Koori Courts, the Elders may not know the background of the offender but are able to show the offender that their behaviour brings shame to the community. While expressing disappointment at the offence, the Elder often shares their own story of how they overcame disadvantage. They offer encouragement and hope to the offender, and explain that the Koori Court and Koori community is there to help.

At one court sitting early in the research, a senior Elder was direct in her interaction with the defendant. She fixed him with a steely eye and said 'Look at me and give me respect'. She did this until he met her eye gaze, when she then expressed her disapproval of his

[40] Stroud, N, 'Non-Adversarial Justice: the changing role of courtroom participants in an Indigenous sentencing court' (2012), in Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, Aston University, Birmingham, UK, 2011, 119-120.

bad behaviour. She told him he had shamed his community and now must take responsibility, turn his life around, return to study and be proud of and respect his cultural heritage.[41] This contradicts the claim that Aboriginal speakers always cast their eyes down as a measure of respect, as in the Koori Court, it appears more an arbitrary occurrence depending on the Koori Elder and/or the offender at that particular hearing.[42]

The meaning and significance of non-verbal behaviour such as eye contact is widely recognised in sociolinguistic and communication research to vary between different cultural groups.[43] My research showed there was a variance in the use of direct gaze between Elders and the defendant in all regional, urban and city courts attended. As the layout of the Koori Court is designed to encourage eye contact and accountability with the placement of the defendant seated directly across from the Magistrate and community Elders, most Elders appeared to use direct eye contact. Several Elders reported that it was important for them to observe body language to see that the defendant was engaging in the conversation.

However, another Elder said he was careful not to insist on direct eye contact

> For me it's about – I get a bit of a sense or a feeling of who is sitting across the other side, so I generally tend to look down at the table and not make it a requirement to take part.[44]

Initial observations at the start of this research suggested that the Koori Elders, when speaking to the defendant about their offence, placed more emphasis on the shame to family and Indigenous community. At later hearings, my data shows that patterns in the courtroom discourse have changed and there is now a more encouraging approach by the Elders. There is evidence that offenders respond better with support and encouragement and are more likely to respond to court orders.[45]

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[41] Stroud, N, 'The Koori Court Revisited: a Review of Cultural and Language Awareness in the Administration of Justice' (2010), *Australian Law Librarian,* 18, 3, 190.
[42] Ibid.
[43] Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, Bristol, 93.
[44] Transcript T7.45 (E).
[45] Transcript T14.58 (L).

Over the research period, the Koori Elders showed more emphasis on the defendant's strengths as opposed to their weaknesses, as long as the defendant took responsibility for the offence and promised to turn their life around.

There was a willingness of participants in the Koori Court, especially the Koori Elders, to listen carefully to each story of why the Koori offender came to court and offer suggestions on how they could help them get back on track and not reoffend. One Koori Elder reflected on his own attitude:

> I've started to reflect (…) on how can I give whoever sits across the table – the brother or the sister, some useful stuff to take away.
> I'm trying to think about what's going to be the most powerful or have the most impact to trigger some sort of thought for them so that when they walk out, at least they'll say 'I don't like what he said to me – but I might go and have a look at that', or 'I do want to go and find out about my mob', or something, you know[46]

3 *Role of the Offender*

Koori defendants must plead guilty to the offence to have their matter heard in the Koori Court. They often have many other problems which affect their lives and impact upon their sentencing situation. In the mainstream court, where the defendant is usually silent and isolated in the dock, there is not the time for the Magistrate to hear about any difficulties the person may have which have contributed to their offence. One lawyer who represents clients in both mainstream courts and Koori Court, commented that there is a real need for understanding of the history of the defendant.[47] In spite of a recent increase in the number of cases heard in the Koori Court due to changes in sentencing and bail laws, there is sufficient time and appropriate communication to elicit a wide range of circumstances impacting upon the defendant in order to support the sentencing process.

[46] Transcript T7.41 (E).
[47] Transcript T14.58 (L).

One of the main variations between the role of the Koori offender in the mainstream court and Koori Court is in their participation and interaction in the court process.[48] In the mainstream court, defendants are usually isolated in the dock, are largely silent, and only speak through their lawyer, whereas in the Koori Court, defendants sit beside others and speak for themselves, with one or two exceptions. My observations at hearings in the Koori Court revealed that the offender feels 'safe' in this culturally sensitive place where they have a 'voice' in the court process and will be listened to by Elders of their Indigenous community.[49]

Relationships can interfere with the outcome for a defendant in the Koori Court. One defendant observed for over a year, returned several times to court after a roller-coaster of re-offending.[50] 'Cathy' was unable to leave her husband, an offender with a bad influence on her. She had a large family and four of her children were in the care of supportive non-Indigenous foster carers. One of the carers came to Court with her to give her support and provide some background to her case. On this one day of hearings, 'Cathy' entered the court from custody and quietly sat at the table. She was respectful in court but spoke little. The Magistrate at this hearing commented that her body language was terrible, but her face 'looked good'. The Magistrate spoke to her plainly in an encouraging manner, but pointed out that there were some important decisions to be made:

> You're a beautiful woman. You're glowing. You have a beautiful smile when you talk about your children. I can see it in your face. I want to show you how special you are to the court and the community. Keep your head high. You will get there.
> There comes a time in life when Aboriginal women need to choose. Most of us choose the right path. You've got good people looking after you. Only you can decide the path you take. Your children want to see their Mum healthy, drug free. Keep trying, there's light at the end of the tunnel. One day at a time.[51]

[48] See Chapter 3 Section VII for further information on the role of the Koori offender.
[49] This is revealed in the body language of the defendant when they come into the court, with a visible relaxing of the shoulders.
[50] Transcript T30 (D).
[51] Notebook 34, T30 (D) hearing.

The Elders all offered suggestions on how 'Cathy' could reconnect with Aboriginal people and organisations that could help. In spite of all the encouragement and offers of help from the Magistrate and all participants in the court, 'Cathy' was not willing to make the necessary changes in her life, even when it was pointed out that this would be for the sake of her children. The influence of her husband outweighed the influence of the supportive foster parents of her children. This demonstrates that even the best efforts at appropriate communication may not result in a changed outcome for the defendant.

Observation of defendants showed that some find it is quite confronting to sit directly opposite the Judge or Magistrate and Respected Elders, and be told that they have 'let down their community' by their actions. This was evident by the body language of 'Cathy', who sat with head down and shoulders slumped until engaged by the Elders in conversation. Cathy's body language then changed, her head came up and even though she was hesitant, she was able to speak about her life. When defendants feel comfortable and safe to talk, the conversation improves, and there is greater interaction and cooperation, as observed in the case of 'Cathy'.[52]

This was not the experience of another defendant, Robert, who was observed over a period of a year. Robert was a young male in his 30's. He was from a well-respected Indigenous family, but who had been in custody on charges of aggravated burglary and recklessly causing injury. He entered the court from Custody accompanied by two guards, gave a big smile and called out 'Hi Mum' to his family sitting in the court. His body language was very confident and he hugged his partner before sitting at the table and was able to converse easily with the Magistrate and Elders. In spite of his apparent confidence, it was only revealed later during the hearing that he could neither read nor write, and this had an effect on his life.[53] This was not an isolated problem during courtroom interaction in the cases observed, as the confident body language of a defendant can mask difficulties of understanding.[54]

[52] Ibid.
[53] Notebook 34, Transcript T22 (D).
[54] Transcript T3.2 (M). One Magistrate is particularly mindful of this and says she makes a point of checking for understanding throughout the hearing.

Robert began speaking with an apology to the Elders, and apologised continuously throughout the hearing for letting down his family and community. He told the Court that he had experienced a traumatic childhood and turned to drugs to dull the pain. He had provided a letter on his background to the Magistrate which was not read out to the court for privacy reasons.[55] Robert acknowledged that he must change his behaviour but found this difficult to achieve. In this particular exchange, he had spent many days in custody and the Magistrate was considering assessing him for release with a community court order.

The following exchange demonstrates how the Magistrate and Elders listened to Robert's story and encouraged him on a path of rehabilitation.[56]

Extract:

1.	Elder 1	What steps do you want to do for the future?
2.	Defendant	Sort my accommodation, TAFE, take my time, make choices.
3.	Elder 1	We don't want you to feel that jail is a safe place.
4.	Defendant	I don't want to, but I do.
5.	Elder 1	You don't want to be institutionalised.
6.	Defendant	I realise I've got more support than I thought.
7.	Elder 1	Whatever you do in life flows on to the family.
8.	Elder 2	(Asked defendant about his family. Commented that she knew his grandmother, now dead, who loved him very much).
9.	Elder 2	Now - Uncle, me and (Koori Court Officer), - we don't like to see our people in jail. It breaks my heart. Remember - a lot of things aren't your fault.
10.	Defendant	I've carried the guilt.
11.	Magistrate	These things are NOT your fault (being unable to read and write). But the things before the court ARE your fault (drugs, violence). I will have you assessed for a further CCO. You must not go back to (regional town). You've got your culture. A lot of people before the court don't have that. Even learning to read and write can be started.

The Magistrate then made an appointment to have Robert assessed by the Court Integrative Services Program (CISP) and return to Court later in the day.

[55] Transcript T22.99 (D).
[56] Note Book 34. T22 (D).

This extract shows how the Magistrate and Elders engaged with Robert and encouraged him. When it was revealed that he could neither read nor write, they gave him support and said that although that was not his fault, the things before the Court WERE his fault. They made him see the impact of his actions. Another defendant who was seated in the body of the court and witnessed the above exchange, remarked 'it's up to him to change his behaviour'.[57]

The exchange also demonstrates that for Koori offenders who spend time in prison, it is not easy to return to the outside world without support. Even with the best will, there must be something to replace the drugs or life that sent them into custody. During the Court hearing, Koori Elders may ask the defendant to talk about their interests. If it is revealed that they have an interest in boxing, art, music or sport, they are then encouraged to continue this.[58]

4 *Koori Court Officer*

The position of Koori Court Officer was created specifically for the Koori Court. There is no designated equivalent role in the mainstream court. The Koori Court Officer has an enabling position in the court, as they liaise with all participants both before and after the hearing. Because of this interaction, they have an understanding of any difficulties the person may have when they come to court.

One Koori Court Officer described how the layout of the court impacted on the interaction and court process. He explained

> In the Koori Court we focus on being equals, and that's why the Magistrate sits down at the table and it's a round table to replicate sitting around a camp fire, and as Aboriginal people

[57] Transcript T9 (D).

[58] I observed at hearings in the Koori Court, when the defendant was encouraged to talk about an interest they had in sport, music or art, or any plans they had for the future, this had a positive impact on the interaction of all at the table. Defendants often brought their paintings, medals of sporting success or plans for recording their music to the court. They were able to share their story with people who listened, in a culturally aware environment.

> feel comfortable talking in a circle, and we sort of try and implement that in our court room, so everyone is sitting on the same level and we're all equals and we're all working together as a team and I think that that's what really separates us from mainstream court.[59]

> We're a community inside the court, and we're trying to emphasise that as much as possible[60]

A Koori Court Officer usually demonstrates understanding that coming to court is a daunting experience for an Aboriginal offender.

> We're trying to create a safe environment for people – a welcome for people to want to come in and participate.[61]

One of the Koori Court Officers who was present from the early stages of the Koori Court, was asked about the importance of the participation of the Elders and the Indigenous Community. She said

> I think it's really important that the more community support persons you can have in the court the better, because they can then assist the person going before the court, listen to what is going on, and then make a determination how that agency can then support that person in the community. So I think it's really important that the support agencies are present during the hearing.[62]

5 *Police Prosecutor*

The role of the police prosecutor in the Koori Court is very different to that in the mainstream court. In addition to reading the charges for the offence and liaising with the defence counsel about any changes, in Koori Court the police prosecutor is also able to take part in the general conversation around the table. This differs from the mainstream court where the police prosecutor, impersonal and in full uniform, sits at the bar table

[59] Transcript T10.71 (O).
[60] Transcript T10.87 (O).
[61] Transcript T10.81 (O).
[62] Transcript T5.42 (O).

and takes part in the formal process, to read the charges, making no comment and having no contact with the accused.

My observations during court hearings revealed differences in the way police prosecutors conducted the prosecution case. Those who had attended the Koori Court over many years were more inclined to constructively participate (sometimes vigorously) in the conversation, citing examples of how the defendant could change their behaviour and the consequences if they did not. Other prosecutors who had not participated in Koori Court merely read the charges and did not take part in the discussion. One interesting feature was that there was a preference by police respondents to remain in uniform during the informal hearing (in spite of a recommendation to attend court in plain clothes). They reported they wanted to reinforce the fact that police in uniform need not be feared by Aboriginal Australians.[63]

According to the Police Prosecutor

> The basic premise of Koori Court is that it's a plea court, so a plea of guilty has to be entered in order to qualify to come into the court. So this differs from the mainstream court where there may be a legal argument because the plea is not known.[64]

> I make sure that I look at people's facial expressions and their sense of understanding during the hearing. I move my chair around the table so I can engage with the defendant and look them in the eye.[65]

> The whole purpose of having a special court is that Koori people are treated with respect and it doesn't matter what their background is, or what they've done, even for that matter, it's about treating – for this moment in time, it's about treating people with respect.[66]

On the question of how communication is enhanced or inhibited in the Koori Court, the police prosecutor had several suggestions:

[63] Comment made by one respondent prior to court case.
[64] Transcript T6.4 (PP).
[65] Transcript T6.10 (PP).
[66] Transcript T6.12 (PP).

> I would like to see more frequent proper training, including Magistrates, prosecutors and lawyers as well as the Elders. It's all about being the right kind of person, understanding Aboriginal culture, just being sympathetic with the culture and the whole concept of not wanting to put Koori people in jail for various cultural related reasons. It's just a general concept.[67]

> The Elders and people who are not so associated with the legal profession, their training should be at the same place and at the same time, but they could get more used to how the legal people look at things, and the legal people and prosecutors could get more used to Aboriginal customs. You need to reinforce these things. I found it absolutely fascinating. You sort of think – oh, an outsider would sort of think 'oh yeah – bull-dust' you know'.[68]

> I would also like to see the Koori Court Officer liaise more with participants (they used to).[69]

> Perhaps there should be two Koori Court Officers, one to be in court and one to carry out all the duties that arise from the court.[70]

The police prosecutor also considered that it was important for defendants to find out about their family and to learn about their culture.

> I think it's super important for defendants to find out about their family and to learn about their culture. The Elders could do with more training – it is easy to forget your initial training and end up saying things like 'I wish the best for you love, and you're doing really well', which are all good reinforcement stuff, but there could have been so much more - about 'when was the last time you were involved in (name), or –'so you live at Dandenong, so when was the last time you went to the Co-Op, and who do you know down there?'[71]

This demonstrates that for successful communication, it is important to have open dialogue between all participants at the Court hearing. Lawyers are able to explain to non-legal participants the legal processes which must be carried out in the court. Koori Elders are able to explain to non-Indigenous participants how life is for an Aboriginal Australian. The Koori Elders contribute to the cultural empowerment of the defendants.

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[67] Transcript T6.54 (PP).
[68] Transcript T6.62 (PP).
[69] Transcript T6.98 (PP).
[70] Transcript T6.108 (PP).
[71] Transcript T6.68 (PP).

This two-way understanding and awareness of difference enhances the communication in the court.

6 *Defence Counsel*

It is the role of defence counsel to represent their client to the best of their ability in both mainstream and Koori Court.[72] My data shows that the defence lawyer who has undergone intensive Aboriginal cultural and language awareness training such as that offered to lawyers at the Victorian Aboriginal Legal Service (VALS), regularly displayed a high level of awareness of some of the cultural and language difficulties which may emerge during interaction with defendants in the courtroom.[73] Some lawyers who spend more time in the mainstream system and then come to Koori Court, tended to use more honorifics when addressing the Magistrate, such as 'Your Honour', and adopted more formal language 'such as 'pursuant to…' or 'if it pleases Your Honour'. VALS lawyers rarely used such formal language.

The defence lawyer's role is a conduit between the client and the court.[74] The lawyers considered it important to take the time to explain the process to the client. There appears to be a common goal in the Koori Court of people working together. This differs from the adversarial nature of the mainstream court. In the Koori Court, the lawyer works with the Koori Court Officer to access details regarding rehabilitation or support services for the client. Sometimes there may be a difficulty in contacting clients when they have a different phone number at each court hearing. Clients living on tenuous finances and inconsistent housing find keeping court appointment dates very difficult.

One lawyer made the following comment:

[72] See *Magistrates' Court Act* 1989 (Vic) and *Magistrates' Court (Koori Court) Act* 2002 (Vic).
[73] See Victorian Aboriginal Legal Service at <www.vals.org.au> for cultural awareness training information.
[74] Transcript T11 (L), Notebook 25.

> The Koori Court process is therapeutic - not always so in the mainstream (court). The Koori Court attracts people with a therapeutic philosophy – they are on the same page. Incarceration is viewed as a last resort.[75]

One factor, of course, is that in the mainstream court, the lawyer is under much more pressure to have the matter dealt with quickly. In the Koori Court, as explained in Chapter 3 of the thesis, there is more time allowed for interaction and conversation around the table, and that is where a much clearer picture of the background to the offence is given. According to one defence lawyer:

> It does require a completely different style of advocacy - it's a lot more informal. I think you get across to the bench and the Elders with greater force. Strangely enough, it's a complete opposite to mainstream, whereas actually the more professional and the more attuned to the jargon that you can be, generally the better reception you're going to get in the court. Whereas in Koori Court, you can almost go the complete opposite, and the more informal you are, it tends to speak - it speaks louder in the Koori Court.[76]

On the question of Aboriginal cultural issues and differences in the use of language used in the Koori Court, the lawyer explained

> I tend not to use what I call specific Aboriginal cultural terms, like 'yarndi' or 'gammon' or something like that. Sometimes it's used by the Elders, by my clients, or by some Bench, but I tend to err on the side of caution and not use them unless I have permission by my client or it is written in the charge as a 'possess cannabis charge''. Then the client will probably say 'oh, I had a bit of yarndi' and then I'll say 'O.K. you had the yarndi', and so once I've got that, then I feel free to use the term.[77]

> I still have a very formal role, I'm still my client's defender in that sense. Because the prosecution reads out the summary in a very formal manner, I continue to use 'cannabis'. I still need to be a little bit formal, but as for the advocacy style of not using overly jargonistic words.[78]

[75] Ibid.
[76] Transcript T14.16 (L).
[77] 'Yarndi' is a term favoured by Aboriginal people denoting substances such as marijuana or cannabis.
[78] Transcript T14.36 (L).

When asked about the impact the Koori Court process may have on a defendant, this lawyer had some perceptive comments:

> When the conversation focuses more on my client's strengths as opposed to their deficits, the sentencing conversation goes much better. And generally the outcomes are better and my clients tend to walk out, comply with their orders and feel content with the outcome.[79] And the communication is more back and forth. When the conversation tends to focus more on shaming out all the client's deficits, there will be a shut down from my client. That's when my client will get belligerent and often they'll feel they're not being heard, and say 'fuck you I'm not doing it'. The attitude towards walking out of that court, about whether they are going to engage with that sentence or not, is totally determined on how the conversation goes in court. So if they walk out with a community corrections order and feel like they have been punished, I guarantee most times there'll be a breach. If they walk out and say 'oh – I feel I've really been heard, and they really want to help,' the order gets complied with.[80]

This perception by the lawyer shows that the defendant is more cooperative when their story is heard and their case dealt with fairly. The Koori Court is thus able to meet many of the overall needs of the defendant by offering encouragement and practical advice at the court hearing, with on-going support by the support agencies involved.

7 *Support Staff or Family Member*

Outcomes for the Aboriginal defendant in the Koori Court were observed to be less punitive and more therapeutic when representatives of the various support agencies were present in court at the time of the hearing, especially when the support person could then be introduced to the defendant.[81] An Indigenous person is more comfortable if they can put a face to a name. As one Koori Court Officer observed:

> A face without a name is very intimidating to a lot of people. It is very important to know who's who in the room.[82]

[79] Transcript T14.58 (L).
[80] Ibid.
[81] Notebook 35. Magistrates encourage support service representatives to be present in court at the time of the defendant's hearing. This is sometimes difficult to arrange due to delays in the days' cases.
[82] Transcript T10.89 (O).

One of the best examples of the support in the court system is that of the Court Integrated Services Program (CISP), which provides short term support and access to services such as drug and alcohol treatment, mental health assessment or emergency housing to an eligible defendant. This support reduces the risk of an offender breaching bail conditions or reoffending. The support services person described this as:

> In Koori Court we're trying to reduce that risk, and there's a lot more understanding around the table and a lot more responsibility placed on the client when they're faced with the Elders and their family, and I think sometimes that kind of gives them a push in the right direction and reminds them of their purpose in life.
>
> Koori Court is a place where the client can be reminded of who they are and be supported through that journey as well.[83]

In a separate instance, the Koori case worker was observed to have a strong connection with her client

> It's not easy to embrace your cultural identity when others query your Aboriginality because your skin was too light or your features not 'Aboriginal' enough'[84]

Her encouragement to defendants to explore their cultural heritage and spirituality embraces the philosophy of the Koori Court. The following extract exemplifies the enhanced communication

> I think 'Andy' and I shared a lot in terms of cultural identity and how important that is to us. I shared with 'Andy' how it's hard for me to identify as being Aboriginal and it's a matter of me putting it into a box because my father was Aboriginal and that's all that I knew, um and then moving down here (to Melbourne) is the most connected I felt to culture and I'm growing within myself and I know that … it's about what you feel and I know with 'Andy'' it's about a lot … part of his life and I think being engaged with the men's group although he has only come once just that hurdle of overcoming … to walk in the door is a huge achievement …[85]

I observed hearings where the Magistrate encouraged family members or support persons to come and sit at the table with the defendant and invited them to contribute to

[83] Transcript T8.80 (S).
[84] Transcript T8 (S). Notebook 32.
[85] Transcript T20.95 (D), comment by caseworker. Notebook 32.

the conversation.[86] At one hearing, a small daughter of the defendant's partner was sitting in the body of the court, close enough to her mother seated at the table to run up and tap her on the shoulder and whisper endearments and hear a reassuring reply. This would not have been possible in a more formal court.[87] This demonstrates that the defendant is not isolated but can be part of a family unit within the court processes.

A further example of the way communication may be enhanced in the Koori Court with the presence of a family member was seen at a hearing where a partner (with a baby over the shoulder) sat at the table next to the defendant and contributed to the discussion. The Magistrate and Elders asked the partner if they were willing to help the defendant in his ongoing rehabilitation. The response was 'of course – I'll give him trouble if he goes back to his old ways.'[88] The Magistrate arranged judicial monitoring for the defendant, and this was also powerful in getting him to comply with orders by bringing him back to court to monitor his progress.

In contrast, one defendant chose not to have support in court. He made the comment when talking about the love he had for his estranged child, that he didn't want his children to ever visit him in prison or court. He expressed that he was ashamed, and I observed his body language when he recounted this statement, which showed his deep shame.[89] In talking about his situation, and his separation from his son, he said

> I don't cry a lot in my life and never could, but I couldn't stop crying for three days.[90]
>
> The last thing I wouldn't want the last time I was in prison, when all the boys were getting visits with their children – DHS (Department of Human Services) were bringing them - and they said why don't you do it, and I said – for one, I haven't seen him for a few years, and two, I don't like him coming into joints like this. [91]

In another observed court hearing, a defendant who had been incarcerated was brought from custody in handcuffs accompanied by two corrections officers. Although allowed to

[86] Stroud, N, 'Accommodating Language Difference: A Collaborative Approach to Justice in the Koori Court of Victoria' (2006), in Selected Papers from the 2005 Conference of the Australian Linguistic Society, edited by K. Allan, at www.als.asn.au/proceedings/als2005/stroud-koori.pdf.
[87] Ibid.
[88] Notebook 33. Partner offers help with compliance of orders.
[89] The body language of the defendant showed a change in posture, with shoulders slumped and eyes averted.
[90] Transcript T20.25 (D).
[91] Transcript T20.17 (D).

sit at the Bar table, they were prevented from sitting next to their family member. A court person was instructed to sit between the accused and family member to prevent the passing of illegal substances. This had an effect on the interaction of all those seated at the Bar table, which was evidenced by the less relaxed body language of participants, and the discourse did not resume for several minutes.[92]

C *Case Studies - (which exemplify some of the voices heard in the Koori Court)*

This section draws on some of the experiences of Koori defendants who have passed through the Koori Court. It clearly shows how the process of the Koori Court hearing can have an impact on the behaviour and outcome for the Koori offender. Three examples are provided. The first demonstrates the behavioural change of the defendant which can occur. The second illustrates the way the presence of Koori Elders assist with interaction between the culture and the law, and the third exemplifies how enhanced communication in the Koori Court has an impact on the outcome for a Koori offender.

Case 1 *Behavioural Change*

This case study demonstrates the impact that the Koori Court had on one Aboriginal defendant who pleaded guilty to an offence. He came to the Koori Court to sit across the table before the Magistrate and his community Elders, in a courtroom which displayed the visible presence of Aboriginal artwork on the wall, and with three flags at the front of the court, the Australian, Aboriginal and Torres Strait islander flags. The layout of the Koori Court clearly showed to the defendant that it is a culturally aware environment.

Over a period of several months, I observed 'Andy' in the Koori Court, attending five hearings of his case.[93] This case study shows how the defendant was able to express his version of the circumstances surrounding the offence and the support that was provided by all who listened to his story. He was given a 'voice' in the proceedings.

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[92] Notebook 23. Observation by researcher of changes in seating at the Bar table in the Koori Court.

[93] Transcripts, T19 and T20. (D). This case is an example of a defendant 'progressing through the justice system'. The Koori Court acknowledges that a defendant may need more time before the final sentencing. The judicial officer, while following precedent as in the conventional court, has judicial discretion to assess each case on its merit, taking into consideration any underlying factors behind the offence (as explained in Ch 3, IV). The Magistrate has the option of a judicial review which enables the defendant to seek help for a problem and return to court at a future date.

At the first hearing, a story emerged of disadvantage including family problems, sickness, drugs and alcohol issues. Andy had originally been charged with theft, credit card fraud and alcohol and drug abuse and had been on remand in prison. During subsequent hearings and adjournments, he was referred to assessments for medical and mental health appointments, and his progress was monitored by the Court Integrated Services Program worker (CISP). He confessed to one or two stumbles on the way, but said that the CISP support worker had kept him on track. She had identified strategies to help him, such as meditation and breathing exercises. 'Andy' noted that 'when I am down, I take a while to get up'. The CISP worker said that 'he engages very well, and if he keeps himself busy, he's O.K.' This shows that support is important, especially after sentencing.

By the last hearing I attended, Andy's progress had been remarkable. He had attended all his appointments, found a job, been clear of drugs, had done some boxing in rehab, and was looking forward to reconnecting with his family, his son, and his community. In addition to this, he had joined a football team and had success with this, even bringing his awards to show the Magistrate and all in the court.

It was interesting to note changes in the language in court over the different days of hearings. On the final day of hearings I had permission to place my recorder on the table between the Magistrate and defendant. In comparison with earlier hearings, when the defendant was quite relaxed and talkative during the hearing, on this day he was much more aware of the presence of the audio-recorder and his language reflected this. At one point he turned away from the recorder and put his hand over his mouth to speak to his lawyer, resulting in an unclear tape. I considered this may be a case of observer's paradox, and will note this in my analysis.

On the last day of Andy's final hearing there were expressions of encouragement from all court participants who had seen the progress made by this defendant.

This case study demonstrates that behavioural change may take time. When the defendant is given a second chance by the court, it is also important that ongoing support and follow-up is available. In addition to services such as those provided by the court system, Koori Elders may direct the defendant to a number of support networks such as

their local Indigenous Co-Op; the Koori Heritage Trust if they wish to trace their family; TAFE for further education; also contact details for sports, music or art groups.

Case 2 *Interaction between the culture and the law*

A defining difference in the Koori Court compared with the mainstream court is the interaction between all participants who sit at the table in the court. The presence of the Indigenous Elders seated beside the Magistrate and directly opposite the defendant has a marked impact on the accountability of the defendant. Throughout the court hearing, the Magistrate follows the process of the law as in all courts in the Magistrates' jurisdiction. At the same time, while the Koori Elders explain to the accused why they must comply with the law, they emphasise the cultural obligation they have to the Koori community and the effect that the offence has on their family and community.

On one occasion, during an interview with one of the Elders, the Elder recounted a story about a young man who came to the Koori Court one day.[94] This story encapsulates the importance of how the Elders interact between the culture and the law, and the extent to which communication is enhanced in the Koori Court. The Elder said:

> One day, this young bloke came before us – he must have just turned 18 – he had a licence but his car was unregistered, and I said 'what are you doing driving a car, you know – you've got to be licenced and your car's got to be registered, and he said to me 'oh I thought I'd take a risk because my girl was pregnant and she wasn't well so I took her to hospital'. He'd just got himself a job, and he'd only been working for a month, and he and his girl had just got a Ministry of Housing unit and he now had a job, and they were setting up their little nest if you like, because she was going to have a baby.
>
> I said to him that the Elders would talk to the Magistrate (which we did) – and we said 'look - don't lock him up, because if you do, he's going to lose his job -he'd lose everything. He'd lose his flat, and they'd all (have to) go back to **her** family – or **his** family, so there'd be too many people in the house which would cause a family breakdown eventually. So it's just a cycle that continues – and we want to break that!'[95]

[94] Transcript T2.104 (E).
[95] Ibid.

In this case, the Magistrate listened, and with the background knowledge provided by the Elder, was able to impart an appropriate non-custodial sentence. The case study shows that the Koori Court Elders play a vital role between the culture and the law in order to enhance communication in the courtroom.[96]

This Elder told me

> of all the programs I've been involved with, this is one of the best. The name of our game is to keep our people out of jail – especially our young people.[97]

The Koori Court aims to seek out the truth behind the offence. The Elders' cross-cultural role supports this. This better meets the needs of the court, the offender and the community at large.

Case 3 *Enhanced Communication*

In this case study, the defendant first came in contact with the criminal justice system when he was 17 years old. In his interview with me, 'Blake' told me that he had passed through the criminal justice system over a period of many years, firstly in mainstream court, with time spent incarcerated in several different prisons in Victoria, and who then came to the Koori Court three years ago. Since coming to the Koori Court 'Blake' has made steady progress and is now in leadership roles in rehabilitation and is keen to speak with the community and disadvantaged Koori youth to tell his story.[98] The case study shows the enhanced communication underpinning the Koori Court process.

Prior to the interview, I had previously observed two cases of 'Blake's' in court and observed his progress throughout the year.[99] 'Blake's' story is one of the importance of

[96] Stroud, N, 'A Sociolinguistic Analysis of Communication in the Indigenous Sentencing Koori Court of Victoria' (2015), Paper presented at the 12th Biennial Conference of the International Association of Forensic Linguists, Guangzhou, China, 6-9 July 2015.
[97] Transcript T2.104 (E).
[98] Transcript T9 (D).
[99] Ibid.

kinship and connection to culture, respect for the Elders of his Indigenous community, and demonstrates how he had to listen to his Elders and act on the decision to take responsibility and change his behaviour.

> The first time going into Koori Court it's real nerves, like you get really nervous because you know there's Elders that are going to be sitting on the board and so – like our culture's strong, so if disrespected by mucking up and you know – it's a big issue for Aboriginal people in that it cuts to the end and they just want pride and young Aboriginal people to step up and take the role of our Elders and pass it down because it's getting lost.
>
> There's already that expectation (by the Elders) of cultural connected where alright, these are my Elders like – an Uncle would, like, straight away, even though we might not be blood related, but we are related somehow, so there is that connection whatever they say – you respect automatically, than hearing it from just a judge or a solicitor and you know, like …
>
> 'Specially in Victoria – you know we're all pretty connected like, even though we're very close – the mobs – so always someone knows someone of the family member and some interaction…..'Cos like I was saying – and like you hear it from them, so it's you don't want to come back and disappoint … they've been so open and giving you a chance.[100]

'Blake' said it was very helpful having the Elders in the court. This was a big difference to his previous situation.

> 'Cos without the Elders it would be still – just like a normal court case without the Elders sitting there.
>
> When you walk in there – by them sitting there already it sets you at ease – it's like that you haven't – at the start we're not (..indistinct) whatever's going on, and then coming back, being cleaned and doing the right thing – it's more for me – it's just catching up having a yarn – how I'm going and it's not like I've got court – that anxiety of – not knowing what's going on, and with the mainstream court it's just – rock up – whatever's happening that day – bang, bang. It's not personal – it's more – to them it's a business, whereas in the Koori Court it's personal, and they're not just dealing with a number – they're dealing with their own kind.[101]

This case study shows the importance of the participation of Koori Elders in the Koori Court process. Koori Elders bring a respect and connection to culture for the defendant,

[100] Transcript T9.15-19 (D).
[101] Transcript T9.32-34 (D).

and this is demonstrated by the enhanced communication which occurs throughout the hearing.

III Findings and Conclusion

This chapter has endeavoured to amplify the voices heard in the Koori Court. It has considered the different roles and observations of participants which show that the enhanced communication during the 'Sentencing Conversation' encourages the engagement of the defendant in the court process. This engagement is evident through the changes in body language and verbal and non-verbal responses, especially under the encouragement of Elders and the modified role of the Magistrate. The Koori Elders often have personal knowledge of the defendant and share their own stories of how they overcame disadvantage. In this court, the Magistrate ensures that the defendant understands the orders, which results in more likelihood of compliance. The Elders contribute to the cultural empowerment of the defendant, and all participants are involved in the interaction.

Another important aspect of communication in this court is that more time is allowed for participants to listen to the defendant's story of their experience in the justice system, and this may reveal any underlying factors which may have led to the offence, with time for these to be addressed. The Koori Elders encourage defendants to take responsibility for their actions and change their ways, and this is evidenced in the case studies.

It is clear that the findings in this chapter offer new insights into the way participants interact in the Koori Court, giving a voice to the disadvantaged Koori offender, and bringing to life the personal stories of Indigenous people in the criminal justice system. This brings about an awareness and understanding of some of the broader social issues of Indigenous disadvantage.

This chapter clearly shows how the Koori Court can have an impact on the behaviour and outcome for a Koori offender. It is hoped that with deeper engagement, the interactive Koori Court brings about change in the life of a Koori offender, who is then able to have

the best chance of reduced problems in the administration of criminal justice in the future.

The following Chapter 7 presents a thematic analysis of responses[102] to a range of questions which examine specific language feature of courtroom discourse and cross-cultural communication. It draws together the responses of participants on some of the linguistic issues which have caused difficulties for Aboriginal speakers in the mainstream courtroom and demonstrates how these are addressed in the Koori Court. The responses support my central argument that an awareness of language and cultural difference in the Koori Court has a positive impact on communication in the courtroom.

[102] Following the studies of Borowski, A, *Courtroom 7: An Evaluation of the Children's Court of Victoria 2009* (2009), Victorian Law Foundation; also Marchetti, E, 'Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014), *Law and Policy*, 36,4.

CHAPTER 7 LISTENING TO THE VOICES

Analysis and Discussion

I Introduction

This chapter examines the extent to which the Koori Court attempts to provide a culturally appropriate and sensitive approach to communication in the criminal justice system. The chapter uses an interactive sociolinguistic approach to evaluate actual language used during the 'Sentencing Conversation' in the Indigenous Koori courtroom, and compares it with the more formal language used in the mainstream court. No new data was collected for mainstream courts, but the analysis has been undertaken having regard to the existing literature on mainstream courts.[1] The findings elicit some of the communicative issues raised in Chapter 4 regarding differences in the process and practice between the mainstream court and Indigenous Koori Court. This analysis of participants' responses underpins my evaluation of the impact of communication issues in the Koori Court.

Anthropologist and sociolinguist John Gumperz, observes that 'detailed analyses of conversational exchanges can contribute to an understanding of broader social issues'.[2] Diana Eades expands on this, and notes that

> while there has been a tradition within sociolinguistics to distinguish between microanalysis, such as discourse analysis, and macroanalysis, such as survey studies of language choice in multilingual contexts, increasingly, the macro/micro divide is becoming harder to sustain, as many (but not all) scholars engaged in microanalysis, for example of courtroom talk, find that this is impossible to understand without examining the wider societal context'. [3]

These comments are particularly relevant to my examination of cross-cultural communication for Indigenous defendants in the criminal justice system.

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[1] See further information on mainstream courts in chapters 1,5 and 6.
[2] Gumperz, J, *Language and Social Identity (*1982), Cambridge University Press, vii.
[3] Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 14. For further information, see also Eades, D, *Courtroom Talk and Neocolonial Control (*2008), Mouton de Gruyter.

Section One of the chapter, this section, provides an overview of the four key areas of inquiry.

Section Two of the chapter draws together the selection of thematic responses in answer to a range of questions regarding features of language commonly known to be problematic for Aboriginal offenders in the mainstream court system. This data was collected from face-to-face interviews and court recordings as outlined in Chapter 5, and transcripts of these were analysed using an adapted conversational analysis approach.[4]

The Section is divided into four subsections of sociolinguistic inquiry to support the central claim. Firstly, sub-section A discusses cross-cultural aspects which may have an impact on the way language is carried out in the courtroom with speakers from different cultural backgrounds. Secondly, in sub-section B, respondents were asked to comment on the way pragmatic issues such as the layout and formality of the mainstream courtroom compares with the less formal process and practice of the Koori Court.[5] Thirdly, in sub-section C, respondents' answers to questions are analysed, and a sociolinguistic interpretation given, with reference to accepted linguistic theory. Finally, sub-section D addresses the nature of the interactive communication which occurs during the 'sentencing conversation' of the Koori Court process. Analysis of communication in the courtroom demonstrates some overlap between all four of these pragmatic features of communication.[6]

Section Three concludes the chapter by drawing together the findings of this study and returns again to answer the initial research inquiry on the way language works in the Indigenous Koori Court compared with the mainstream court.

[4] Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 14.
[5] Pragmatics is the study of language usage, and the way in which context contributes to meaning. This study examines the way the legal setting in a mainstream courtroom may have either an overt or a subtle impact on communication for an Aboriginal speaker.
[6] See Chapter 4, Sections IVA and IVB for further information.

II Thematic Responses

The following thematic analysis of responses follows the approach of Borowski,[7] with further reference to Marchetti,[8] and examines specific language features and general cross-cultural issues which may cause miscommunication in the mainstream courtroom. Responses compared how participants respond to cross-cultural communication in the Koori Court.

Data obtained from audio-recorded court hearings and responses of participants to semi-structured face-to-face interviews were transcribed and examined using the analytical framework of Interactional Sociolinguistics as discussed earlier in this thesis in Chapter 4,[9] with additional reference to significant cross-cultural features. Responses were then collated using a thematic approach and analysed under a number of broad categories, with a sub-set of themes.

A *Cross-Cultural Aspects*

In some northern areas of Australia, Aboriginal Australians may speak several Indigenous languages but have limited English, requiring an interpreter at a court hearing.[10] In Victoria, most Aboriginal people speak English as their first language. Nonetheless, miscommunication can occur in a mainstream court when a number of factors are present, for example when cultural and language differences are not recognised. There may also be an imbalance of power in the courtroom caused by social inequality.[11] One of the initial aims of the Koori Court program was to assess the needs of Aboriginal people caught up in the justice system and ensure their understanding of the process and practice of the court.[12]

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[7] Borowski, A, *Courtroom 7: An Evaluation of the Children's Koori Court of Victoria 2009*, (2009), Victorian Law Foundation.
[8] Marchetti, E, 'Delivering Justice in Indigenous Sentencing Courts: What this Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014), in *Law & Policy* Vol 36, No.4.
[9] For further information, see Chapter 4 of this thesis.
[10] Cooke, M, 'Indigenous Interpreting Issues for Courts' (2002), *Australian Institute of Judicial Administration, 29.*
[11] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 49.
[12] These aims are defined in the Victorian Aboriginal Justice Agreement, Phase 3 (AJA3, 2013), a partnership agreement between the Victorian Government and Koori Community, following the Royal Commission into Aboriginal Deaths in Custod,1991. For further information, see Chapter 3 of this thesis.

The cross-cultural communicative process in the Koori Court takes into account issues of identity, different perceptions of social mores such as politeness, recognition of cultural habits, taboos and kinship obligations.

Responses from participants on cross-cultural communication in the Koori Court were positive. Defendants reported that the Koori Court was a place where they felt 'safe'. Both defendants and court staff repeated this point several times. Defendants said they felt they could relax with their Elders and had time to tell their story and be listened to. This negated some cultural presuppositions made by legal personnel in the criminal justice system, that Aboriginal speakers may give conflicting answers in the retelling of a story.[13]

According to Oshtain, 'when we misjudge shared knowledge or the perception of the other participants in the interaction, we potentially run the risk of creating instances of minor or serious miscommunication'.[14] Shared knowledge affects communication. Oshtain considers that 'for successful cross-cultural communication, there should be three types of background knowledge'.

> Prior factual or cultural knowledge; prior work or life experience; and prior familiarity with the relevant discourse community.[15]

My data shows that the Koori Court achieves all three. The Elders provide cultural knowledge during the communicative process in the Koori Court, and reinforce the importance of identity for an Aboriginal defendant, as discussed in the following section.

1 *Identity*

Identity is the quality of a person or group (such as your name), that makes you different from others. It defines you. According to anthropologist Rod Hagen

[13] Eades, D, 'Taking Evidence from Aboriginal Witnesses Speaking English: some sociolinguistic considerations'(2015) in *Precedent*, 126,46.
[14] Oshtain, E & Celc-Murcia, M, 'Discourse Analysis and Language Teaching (2003), in Schiffrin, D et al, (eds), *The Hand book of Discourse Analysis,* Blackwell Publishing,710.
[15] Ibid.

> The substantial legal value of an 'identity' in today's world makes it easy to forget the impact which demanding essentially 'western' or 'state-based' naming practices can have on cultures and societies that have never traditionally made use of them for purposes akin to our own.[16]

A strong cultural identity gives a person a sense of belonging and self-esteem.

> Within traditional Aboriginal communities 'names' are used to convey very different information, such as status, kinship relationships, the relationship of the speaker to the person names, and current personal circumstances of the individual concerned. It is unusual for a person to retain one stable name throughout their life, as names are context and time specific.[17]

When Aboriginal Australians are caught up in the 'western' criminal justice system, it can have impacts upon the construction of identity. Respondents made a variety of comments about identity. According to one CISP Support worker

> If you don't have an identity, or if you don't know your identity, then what do you have to strive for, or be proud of, and I think in the Koori Court, you know, that is a place where the client can be reminded of who they are and be supported through that journey as well.[18]

One defence lawyer agreed

> What is important to Aboriginal people is 'Who am I? Where do I come from?'. The Elders impart cultural knowledge in the Koori Court and explain to the defendant that they are members of a proud Indigenous community. [19]

Identity can be addressed in the following way, (a) Aboriginality, and (b) lack of formal documentation. I will turn to each.

(a) Aboriginality[20]

[16] Hagen, R, 'Traditional Australian Aboriginal naming processes' (2015) in Castan, M & Gerber P, (eds), *Proof of Birth*, Future Leaders, 87.
[17] Ibid, 89.
[18] Transcript T8.80 (S). Refer also to the successful High Court judgement in the case of Bugmy v The Queen in October 2013 which reasoned that the effects of profound disadvantage (of Aboriginal people from a disadvantaged background) do not diminish over time. <http://austlii.edu.au/cases/cth/HCA/2013/37.html>.
[19] Transcript T11 (L), Notebook 25.
[20] The accepted definition of Aboriginality is 'An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Island descent who identifies as an Aboriginal or Torres Strait Islander and is

Eades notes that Aboriginal people have suffered significant disadvantage and discrimination throughout the colonial and neo-colonial past and present, precisely because of their Aboriginality.[21] Historian Richard Broome reflects that the Aboriginal world has been greatly altered since 1834, but 'belief in being Aboriginal' endures.

> Aboriginal attachment to country, to cultural group and kin, to family and to Aboriginal core values remains indelible. Gestures, a sense of humour and an attitude to time and space that is peculiarly Aboriginal also survive. The experience of a shared history of injustice and life as victims of colonialism – the things that happened 'in them days' – also shape their sense of self. Above all, a belief in being Aboriginal – or Koori as many now say – remains fixed.[22]

Aboriginal people identify themselves by their tribal, community or country name.[23] One very common greeting of introduction is 'I'm Yorta Yorta, from Shepparton', or I'm Gunditjmara, from Warrnambool'. Many Koories may go further by saying for example 'I'm a **proud** Wurundjeri woman' (the word 'proud' emphasised).

At one County Koori Court hearing I observed, it was found that Aboriginality had not yet been proven. The case could therefore not go ahead in the Koori Court, so a normal court had to be convened in the same courtroom, but with all the formalities including Judge and legal professionals in wigs and gowns, defendant in the dock, and Elders seated at the back of the court.[24] Similarly, in hearings I observed in the Magistrates' Koori Court, if Aboriginality had not been proven, the Koori Elders retired from the courtroom and the Magistrate conducted a formal hearing.[25]

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accepted as such by the community in which he (she) lives'. See Australian law Reform Commission, <https://www.alrc.gov.au>publications>.

[21] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 13; Pascoe, B, *Convincing Ground: learning to fall in love with your country* (2007). Aboriginal Studies Press. Pascoe speaks of 'the great Australian silence when it comes to dealing respectfully with the construction of the nation's Indigenous past'. This is 'a personal and powerful work on identity, dispossession, memory and community'.

[22] Broome, R, *Aboriginal Victorians: A History since 1800* (2005), Allen & Unwin, 375.

[23] An Aboriginal person can have multiple identities. In addition to being known by their tribal name, they may use a European name, a skin name or a bush name. It depends on the context.

[24] Stroud, N, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2009). Paper presented at the International Association of Forensic Linguists Conference, Amsterdam, 2009.

[25] Connell, R "Who is an 'Aboriginal Person?': Shaw v Wolf" (1998), *Indigenous Law Bulletin* 4,(12), 20. This case in the Federal Court was based on a challenge of Aboriginality. See also *'Defining Aboriginality in Australia'* by John Gardner-Gordon (2003), Australian Parliament House, Current Brief No. 10 2002-03.

The Koori Elders stressed at all hearings the necessity for the defendant to rediscover their identity and reconnect to their culture. At each hearing, the Elders asked 'who is your mob?' Many defendants were able to answer, but those who do not know their cultural heritage were encouraged to find out more about their family. The Elders may know a defendant's family members, and often recount a personal story about them. This encourages participation by the defendant and reconnection with their family and Indigenous community. The Elders then give their own story and also information of where to find family details, such as the Koori Heritage Trust in Melbourne.

One Elder reported at every hearing that he always found some connection with the offender seated opposite. He said 'with the work I have done in Victoria over the years, I know nearly all the Victorian Indigenous families and can help them reconnect to their community.'[26]

Another Elder told the story of two defendants who came to Koori Court one day; the account illustrates the difference between a Koori offender who has a cultural identity and another who has not.

> Over a period of time, you can really see where there's people who come into Koori Court that are not connected with community (…) they've got on the list only because of who they know, where they've been born, who their mob are, and their connection, but they've not lived in community, they've not lived part of their cultural stuff, and so they have an understanding that is very limited. (…) It doesn't click as it does with some others (…) such as a guy that came in – an older gentleman, who was trying to get into Wulgunggo Ngalu[27] and Community Correction Services knocked him back, right?[28]
>
> He was very strong – he's grown up in community, he's been around people, and he got it straight away – the conversation. You could see that his whole demeanour was like 'shame that I've let

[26] Transcript T4.51-55 (E).
[27] Wulgunggo Ngalu Learning Place is a residential diversion program in regional Victoria that supports Koori men while they complete their Community Corrections Orders. It provides rehabilitation through support, work and training designed to reduce the risk of recidivism.
[28] Transcript T7.21 (E).

> myself down and I've let my mob down, and shame of why I'm here'.[29] On the same day we were doing a young guy in his early 20's, and again, while he had connections through his family name and ancestors, he's not lived this sort of lifestyle as this guy whose grown up around the mob on the rivers or been around community stuff in that sense, and this guy's level of understanding of that, which was so different. I think he needed to be involved in and immersed in cultural stuff.[30]
>
> And so I asked him questions (the older guy) when we had to take a break. I asked him about Port Phillip (prison) and how many of the brothers were out there, you know, so the older fellow, as soon as I used the words 'how many brothers were out there', you know, well he straight away said 'there was about 110 or something (…) and I said 'and who's some of the mobs out there', and he was able to rattle them off, so that to me says straight away 'this fellow has been around the mob – he gets that straight away – that language he understands it, right'?
>
> This young fellow, when I said 'how many of the mob are out there, he had to – I very much get that there was some mental health issues going on, but still you could see him register, so I reworded it – 'so how many Aboriginal fellows are out there in Port Phillip with you?' and he obviously was not connecting. Now he might have been in an isolated unit or something, I don't know, but his recall of how many fellows were out at Port Phillip - it was the same day, same court day as the other fellow, but that said to me straight away – now this lad's either in isolation or (…) something's going on. And as the conversation wore on, to me it was more like I can see why this fellow, if he's not mixing with our mob, the mob in the prison wouldn't associate with him, because he's got that lack of identity, lack of connection, lack of culture, all these protocols, and he just wouldn't know how to connect to the mob, you know, so he would be further isolated. [31]

This story encapsulates the difficulties for a Koori offender in prison when there is not only a lack of an Indigenous identity, but also an inability to relate to any other prisoners. The older man in the story bonded immediately with others who identified as Aboriginal, and there was a strong kinship connection. The Koori Elder recognised that the younger man had missed out on learning his culture and this impeded any reconnection with his community and eventual rehabilitation. He explained that if defendants haven't experienced that sort of traditional learning mode, such as 'watch, watch, watch, learn, learn, learn', the court doesn't have the impact that it should have.[32]

[29] Transcript T7.23 (E).
[30] Transcript T7.25 (E).
[31] Transcript T7.27 (E).
[32] Transcript T7.53 (E).

The question of identity also came up one day when the defendant was asked by Koori Elders 'why are you in Koori Court?' The usual answer was that their lawyer had recommended them to come. However, one of the defence lawyers said that he would only recommend Koori Court to someone who was going to engage in the process. If not, then the accused would be better to go to mainstream court and let the lawyer do the talking.[33]

> I always try and tell my client 'that question's going to come up (of why you are in Koori Court), and you're going to need an answer for it. But often the true answer can be – well look my lawyer gave me all the options and they recommended Koori Court.' I think that's an O.K. answer, but I think it's seen as a bad answer. A perfectly valid answer can be that the lawyer has given the client all the options and then recommended the Koori Court. In the same way I would be saying to someone who I don't think who would fare very well, or they don't want to sit there and be shamed out by their family, and we get that, and they'd rather just sit behind me (in the mainstream court) and let me do all the talking, and I think there's a place for both.[34]

According to the defence lawyer, it is helpful for a defendant to have a support person at the hearing. 'It shows they've got a link beyond their offending to the community'.[35] He reported that his key message to his clients who come to Koori Court is

> what I can always guarantee to a client is that you'll get a more appropriate sentence.[36]

On another day in court, one Aboriginal defendant complained that they were often told that they don't look Aboriginal as they have pale skin.[37] The Magistrate told him the story of an Indigenous singer who had recounted the analogy of a cup of coffee.

> The singer said - you can either have your coffee black, half and half or with a dash of milk. No matter how you have it, it doesn't change the fact that it's still coffee. The singer concluded that the same applies to Aboriginality[38]

[33] Transcript T14.82 (L).
[34] Ibid.
[35] Transcript T14.70 (L).
[36] Transcript T14.90 (L).
[37] Transcript T20.77 (D).
[38] Transcript T20.88 (D). (This story was recounted by the Magistrate during a court hearing conducted on 5/12/16).

This illustrates the importance of acknowledgement by an Aboriginal community and recognition of one's heritage, despite the presentation of skin colour. The defendant went further in his response to comments about his Aboriginality:

> I felt that I had to justify things to people (…), the milk coffee thing, and it annoys me to the crap, but today I say that's their problem and not mine, you know, and I would at times, I would come across as if I'm justifying, and it was a big issue to me once to say it.[39]

He recounted one exchange:

Extract:

1	Defendant	'I'm going to court'
2	Other	'oh what court?'
3	Defendant	'Koori Court'.
4	Other	'I didn't know you're Koori?
5	Defendant	'Oh neither do a lot of people, but we don't all go around with what we are on our head, do we'.[40]

Socio-economic factors also play a part in a person's perception of their identity. For example, a lack of education, no job, homelessness, or insufficient documentation, may all contribute to a person coming into contact with the justice system, and this can have an impact on their identity and self-esteem.

(b) Documentation

The research revealed that one of the difficulties experienced by offenders in court was the problem of insufficient documentation, in particular a lack of a birth certificate or driver's licence. Castan and Gerber have noted that tough ID requirements in Australia can present a significant barrier to some members of Indigenous, marginalised or disadvantaged communities who find it very difficult to produce the requisite ID to access their birth certificate.[41] Nearly every family that comes before the court has at least one member of the family who was involved in the Stolen Generation. Often this results in lack of appropriate documentation.[42] Even younger offenders had a parent or a

[39] Transcript T20.107 (D).
[40] Ibid.
[41] Castan,M, and Gerber, P, 'Registering the births of Indigenous Australians in Victoria' (2015), in Castan, M and Gerber, P (eds) *Proof of Birth,* Future Leaders, 39.
[42] Transcript T4.81 (E).

grandparent who had been taken away from their family, with the loss of their language, culture, community and thus identity.

One of the Koori Elders explained it was sometimes an intergenerational problem

> I came across a mother and daughter of the Stolen Generation inside prison and it was going on for three generations. What people don't understand when Koories come to the court, the history of what happened 200 years ago. Some of them (the Magistrates) understand this.[43]

On another occasion, the defendant told the court that he had difficulties in obtaining a birth certificate because his birth was registered in another state. He felt this was too hard to overcome. One of the Koori Elders was able to help the defendant by offering to speak with the appropriate organisation. [44]

In every case where there was a problem with documentation, the Koori Elders strongly cautioned the defendants that they must obey the law. They stressed that it was an offence to drive without a licence which cannot be excused. However they were very willing to help the defendant overcome the difficulties of complying with all the paperwork.

Sometimes there were literacy and numeracy difficulties in obtaining identification documents. One defendant who was unable to read or write, found this an impediment when charged with an offence. When questioned further, the defendant spoke of their family background as moving from place to place. The early forced migration of Aboriginal people from their land and settlement, was often a factor in the movement and disruption of families.[45] Some offenders who appeared in the Koori Court hearings charged with driving offences did not realise the importance of a driver's licence. They gave perfectly sensible reasons why they had driven a vehicle without a licence, or were unregistered, usually in an emergency and felt they had no option but to get behind the wheel.[46] However those justifications would rarely stand up to legal requirements.

2 *Politeness (including Respect)*

[43] Transcript T4.83-85 (E).
[44] Transcript T19.54 (D).
[45] Transcript T4.104 (E).
[46] Transcript T2.104 (E).

Misaligned social mores can cause miscommunication. Politeness in western cultures is seen as a mark of respect between people. However, Aboriginal speakers do not always demonstrate the required cues to meet western expectations.[47] In cross-cultural communication between Aboriginal speakers and courtroom participants, there may be different qualities of politeness involving kinship relations, totemic relations[48] or clan membership.[49] Eades asks how the legal process accommodates this cultural difference

> to what extent are such cultural difference recognised and understood by legal professionals? And to what extent are they implicated in the effective or non-effective participation of members of minority cultural groups in the legal process?[50]

In Indigenous cultures, the way politeness is understood and expressed, may differ overtly or subtly from western presentations. For an Aboriginal speaker, it is not polite to ask personal questions, so it is acceptable to give an indirect answer to a direct question, or simply to not answer the question. However, Court proceedings are usually based upon direct questions and answers.

Culturally specific gestures can also communicate very different meanings for politeness. Anthropologist Birdwhistle, in his pioneering study in 1970 on non-verbal communication, coined the term 'kinesics', making the observation that 'in the act of talking, eyes, face, limbs and torso all emit signs (…) which convey information'.[51] Therefore when observing cross-cultural interaction in the courtroom it is necessary to be aware of a wide range of non-verbal signs of communication.

This was illustrated at one day of court hearings, where a defendant displayed extrovert and expressive body language during his case;[52] conversely, during a different case, the defendant sat very still and hardly spoke.[53] The Magistrate, Koori Elders, and all at the

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[47] Refer to Chapter 4 – as noted in Grice's 'cooperative principles' (1989), Levinson's 'politeness principle', (1987), and Gumperz' work on interactive sociolinguistics (in Schiffrin et al, 2003).
[48] 'Totemic' relates to a spiritual emblem in Indigenous spirituality (a natural object, plant or animal) which defines peoples' role and responsibilities and relationships with each other and creation.
[49] As mentioned in Chapter 4, Magistrates in the Koori Court are mindful of the different conventions and assumptions which may affect meaning and attitudes between speakers.
[50] Eades, D, *Sociolinguistics and the Legal Process* (2010), Multilingual Matters, 93.
[51] Birdwhistle, R, (1970), as cited in Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press, 141.
[52] Transcript T22 (D).
[53] Transcript T30 (D).

table politely gave each of these defendants respect as an individual, and conducted the hearing accordingly, despite the very different body language. In contrast, in a busy mainstream court, the defendant is represented by their lawyer and is not active in the court process.

My findings revealed another culturally specific gesture in cases observed. Many of the defendants at the conclusion of the Koori Court hearing, made a point of politely shaking hands with all participants at the table, whether their case was favourable or not. This was evidently an expression of the end of formalities. Some defendants even went further and gave a big hug to the Elders, which showed the strong kinship ties and emotional bonds between the Indigenous communities. It was evident that the Elders were held in high respect by all defendants observed in this research.

3 *Cultural Assumptions*

As Eades highlights, there are a number of assumptions underpinning language that can significantly impact on courtroom interaction involving Aboriginal people.[54] Eades acknowledges the diversity of Aboriginal cultures, experiences and ways of communicating. She notes that any discussion should include the ability of some people to switch between two (or more) different cultures and different ways of communicating.[55]

A number of other writers have also recorded instances where cultural assumptions may cause miscommunication in interaction with Aboriginal people in Australian courts of law or Indigenous land claim hearings (see especially Cooke (2002), Walsh, (1994), Koch (1990), Neate (2003) and Liberman (1981).[56] I examine some of these examples, and show how the Koori Court accommodates these.

[54] Eades, D, 'Taking Evidence from Aboriginal Witnesses Speaking English: some sociolinguistic considerations' (2015) in *Precendent,* 126, January/February 2015,45.
[55] Ibid.
[56]A number of legal and linguistic academics have recorded examples where cultural assumptions may cause miscommunication in interaction with Aboriginal people, notably Cooke, M, 'Indigenous Interpreting Issues for Courts' (2002), 38 *Criminal Law Bulletin* 244; Walsh, M, 'Interactional styles in the courtroom: an example from northern Australia' (1994), in Gibbons, J (ed) *Language and the Law,* Longman Group, 217-233; Koch, H, 'Communication and Translation in Aboriginal Contexts' (1990), Series S,5 *Australian Review of Applied Linguistics* 1-47; Liberman, K 'Understanding Aborigines in Australian Courts of Law' (1981), 40 *Human Organisation: Journal of the Society for Applied Anthropology,* 247-255; Neate, G,

One assumption in the formal legal process is that the most effective way to find out information is to ask questions.[57] As already discussed in Chapter 4, Aboriginal people consider this rude, and prefer to use indirect ways of finding out or conveying information.[58] When this occurs in the formal courtroom, the defendant may be considered uncooperative. The time allowed during the Koori Court hearing, however, allows the person to talk around the topic before being ready to share their information. The interlocutors (speaker and hearer) thus become more important in the cross-cultural conversation.

Another common assumption by the legal profession in the Victorian mainstream court is that because the Aboriginal accused speaks English, they understand everything that is being said during the court hearing.[59] My findings show that the Indigenous Koori Court is mindful that this may not be so, and strategies in this court are two-fold. Firstly, prior to the court hearing, the defence lawyer reviews the case with the defendant to ensure they understand.[60] Secondly, there are continual checks by the Magistrate during the hearing that the defendant understands the process.[61]

Eades notes a further assumption that when a speaker gives conflicting answers to a question, this indicates inconsistency and untruthfulness.[62] This assumption is not relevant in the Koori Court, as it is not an adversarial court. The defendant has already pleaded guilty before coming to court, and their recounting of events merely gives background to the charges which enables participants to engage in conversation with them.

4 *Kinship obligations / relationships*

'Land, Law and Language: some issues in the resolution of Indigenous Land Claims in Australia' (2003). Paper presented at the conference of the International Association of Forensic Linguists, Sydney, July 2003.

[57] Eades, D, 'Taking Evidence from Aboriginal Witnesses Speaking English: some sociolinguistic considerations' (2015), in *Precendent,* 126, January/February 2015,46.

[58] See Chapter 4 for further discussion of this topic.

[59] Eades, D, 'Taking evidence from Aboriginal Witnesses Speaking English: Some Sociolinguistic considerations' (2015), in *Precendent,* 126, 45.

[60] Transcript T14.12 (L).

[61] Transcript T3.2 (M).

[62] Eades, D, 'Taking Evidence from Aboriginal Witnesses Speaking English: some sociolinguistic considerations' (2015), in *Precedent,* 126, January/February 2015, 45.

Aboriginal kinship and family structures are still cohesive forces which bind Aboriginal people together in all parts of Australia, and kinship responsibilities must be adhered to.[63] In the mainstream court, miscommunication may arise when a defendant will not name a deceased person or sacred place because of strict cultural taboos. If they answer in an indirect manner, they may appear untruthful.[64] In the Koori Court, this is better understood.

A communication clash may occur if a defendant misses a court hearing due to attendance at a funeral. In the mainstream court, this is accepted for the one court date. However, if the absence is prolonged, this could result in a penalty or even a warrant for an arrest. In the Koori Court, however, if a valid reason is given for an extensive absence, a new date is provided. What is not universally known, is that the cultural obligation for an Aboriginal person to attend a funeral is very strong, and an absence may stretch over a lengthy period and even require travelling to a different part of the country. According to one respondent

> Often the funeral is not in a Melbourne suburb, so the funeral could have been yesterday, or even last week, and the person still might be away, so you have to make allowance for that fact – it's not just the funeral today, but it's the funeral a few days ago or whatever.[65]

The Koori Court is aware of these cultural considerations of obligation. This is where the role of the Koori Court Officer is vital as a liaison between the defendant and the court.

At one day of hearings, case after case was adjourned due to the absence of each offender. The Koori Elders explained kinship obligations to the Magistrate, as the offenders were obliged to attend the funeral that day of a member of the local Indigenous community. Without this knowledge, the offenders would be recorded as 'failed to appear' and receive a penalty.[66] This demonstrates the important role of the Elders in the communication of cultural contexts.

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[63] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 50.
[64] An example of this is if the counsel in the mainstream court asks the accused 'what day were you at the house with (name)?' an indirect answer may be given, for example 'it was the day that my aunty came to visit'. The defendant's indirect answer may be considered unhelpful or even untruthful.
[65] Transcript T6.56 (PP).
[66] Stroud, N, 'New Developments in Language and the Communicative Process in an Indigenous Sentencing Court'. Paper presented at the Language and the Law Day, Canberra Langfest, ANU, Canberra,2011.

Aboriginal people consider information about kinship the most important way to find out something about a person. By asking 'who's your mob?' a connection is then made with the defendant and in most cases, the Koori Elder knows a family member and the defendant feels comfortable to speak to their Elders in a safe environment. If the accused does not know their family's background very well, they will be given contact information for local Aboriginal community organisations. This is considered a very important part of their rehabilitation.

During the early days of this study, one defendant was in court on a breach of a Community Corrections Order (CCO) but he had been obliged to attend a funeral of a family member. The lawyer representing the accused, but new to the Koori Court, made the clichéd comment that the accused had 'gone walkabout'. This was not a normal comment heard in the Koori Court.[67] Most legal counsel representing Koori offenders are more aware of factors which may conflict with a court date. As emphasised at the beginning of this section, kinship obligations are very strong in the Indigenous community.[68]

One difficulty which may occur at the start of a hearing is if one of the Elders is related to the defendant. Many Aboriginal Australians are inter-related and have close family connections with Aboriginal communities throughout Victoria.[69] If this occurs, the Magistrate asks the Elder if this relationship may impinge on the outcome of the case. If not, then the hearing goes ahead.

B *Courtroom Context*

The physical layout of the courtroom itself plays a large part in the sentencing process, and miscommunication can occur in the mainstream court when several factors are

[67] Comment made from the bar table at a County Koori Court hearing in 2011, observed by the researcher.
[68] Aboriginal kinship and family structures bind Aboriginal people together. Kinship obligation is very strong.
[69] There are strong family ties between Aboriginal communities throughout Victoria. This may be due in part to post-colonial days when families were taken from their land and community by the government and dispersed throughout Victoria. For further information, see Broome, R, *Aboriginal Victorians,* (2005), Allen & Unwin, 375.

evident. For example, pragmatic features which affect communication such as the formal layout of the courtroom may be intimidating for a Koori defendant; there may be a power imbalance between the judicial officer high at the Bench and the offender isolated in the dock; and the formal process of legal discourse may also intimidate, with no time to check for understanding.[70]

Responses from defendants were mixed about their experience in the mainstream courtroom, especially from defendants who felt that there were significant barriers to successful communication as they were not part of the action. They reported that any barriers were overcome by the informal process and culturally sensitive layout of the Koori Court.

1 *Cultural Setting*

The research shows that in the informal Koori Court, several pragmatic features are evident, demonstrating different ways of interaction and communication by participants. Of primary significance is the more culturally sensitive layout of the courtroom which has an effect on the behaviour of participants. Three flags situated at the front of the court, the Australian, Aboriginal and Torres Strait Islander flags, and Aboriginal art displayed on the wall, all emphasise the cross-cultural nature of the court.

At the start of all Koori Court hearings, the Welcome to Country is given by the Magistrate, who acknowledges the original inhabitants of the land on which the court stands, and pays respect to Elders past and present.[71] The defendant is welcomed by name and introduced to all at the table. All respondents agreed that in the Indigenous culture, this welcome is very important and reduces the intimidation often felt by the

[70] These features of language have been well documented by legal and linguistic academics over several decades. See Eades, D, 'Communication with Aboriginal Speakers of English in the Legal Process' (2012), *Australian Journal of Linguistics*, 32,4,478; See also Marchetti, E, (2014), 'Delivering Justice in Indigenous Sentencing Courts: What this Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014), in *Law & Policy* Vol 36, No.4; King, M, Freiberg, A, Batagol, B, and Hyams, R, *Non-adversarial Justice* (2009), The Federation Press.

[71] This is a formal protocol commonly observed at government and Indigenous functions and events which pays respect to Aboriginal and Torres Strait Islander peoples and acknowledges their connection to Country.

defendant in a mainstream courtroom. It is a form of social politeness that is appropriate in western and Aboriginal communication. According to one respondent

> It's really important to know who's who in the room. A face without a name is very intimidating to a lot of people.[72]

In the Koori Court, there is continuing interaction between all participants around the table, and all are encouraged to contribute to the discussion. Magistrates who preside in the Koori Court all agreed that the layout enables good communication.

> One of the things about the court that enhances communication is that we are on the same level. I think that we're at an oval table, and that they (the defendants) sit directly opposite the Elders and that forms a good – it forms a connection around the table – we're all part of the connection.[73]

Most Magistrates in the Koori Court agreed that it was important to make sure that the Koori Court was a safe place for Koori defendants. One Magistrate reflected that

> I'm (…) encouraging that level of informality which I think actually improves communication because it just continues to improve the comfort of the people who come to Koori Court, and the more I think about it, the more I think how important it is to make the Court a safe place. And the language that we use and the informality, continues to make the Koori courtrooms safer and the fact of making the Koori Court safer I think makes the whole of the Court system a safer place for Koories.[74]

According to one of the Koori Court Officers

> We're trying to create a safe environment for people – a welcome to people to want to come in and participate (…) we try to make it as safe and as welcoming as possible and make the client feel as comfortable to actually speak of their story, because we find that it's the ones who hold back (who) don't get – they get the results they want, but they're not actually sharing their story and not benefitting as much as they actually could be, so you've sort of got to put yourself out there,

[72] Transcript T10.89 (O).
[73] Transcript T3.44 (M).
[74] Transcript T29.4 (M).

> but we try and keep it simple and good language, just like you talk. If I speak to (name) down the street, I wouldn't talk any different to him than what I would in the courtroom[75]

Most respondents said that the Koori Court setting enabled the defendants to feel less stressed when coming to court. They reported this helped them feel that this was a safe place where people were willing to listen.[76] They noted that this differed from their experience in the formal mainstream court where they did not feel part of the process but relied on their lawyer to speak for them, where they were 'switched off' because they felt they had no say in the outcome, and often sat with head bowed, just waiting to hear the verdict.[77]

One change in the layout of the Koori Courtroom during the research was the introduction of video link screens which are now becoming more frequently used in all courts, especially with the defendant who remains in prison. Video links are now used in courts to assist in the increased number of cases heard in a day, and the frequent delays in transporting offenders from remand or prison. However, my findings showed that in the Koori Court, video link screens changed the 'sentencing conversation' back to a dialogue between the Magistrate and defendant, with other participants taking a minor role. The defendant was not able to take part in a culturally sensitive environment, but remained isolated in a confined place in prison. It is evident that the body language of the defendant is not so easily observed for subtle clues of understanding, and their language is more constrained on video link. Increased use of video may thus negate some of the positive outcomes of Koori Court communication.[78] Future research is needed to draw conclusions on this.

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[75] Transcript T10.81 (O).
[76] Transcript T10,36 (O).
[77] Transcript T14.58 (L).
[78] Stroud, N, 'Do Changes in Technology Impact on Communication in the Victorian Koori Court?' Paper presented at the 14th Biennial Conference of the International Association of Forensic Linguists, held in Melbourne on 1-5 July 2019. The positionality of the Magistrate is a key factor in the Koori Court process. Changes in the use of computer technology such as video conferencing can impact on communication in this court between the Magistrate and defendant, with subtle non-verbal clues not so easily observed'.

2 *Power*

The role of social or cultural power in the courtroom is also an important factor in communication. It is clear that the formal nature of the mainstream court, with its markers of power and prestige, has the ability to intimidate an Aboriginal offender, indeed, any offender. The powerlessness and social inequality often experienced by Aboriginal defendants in the mainstream court is partly ameliorated in the Koori Court by the informal seating around the table in the centre of the court. According to one participant

> In the Koori Court we focus on being equals, and that's why the Magistrate sits down at the table and it's a round table to replicate sitting around a camp fire, and as Aboriginal people feel comfortable talking in a circle, we sort of try and implement that in our court room, so everyone's sitting on the same level and we're all equals and we're all working together as a team and I think that's what really separates us from mainstream court [79]

In comparison, the layout of the formal court, with the Magistrate elevated on high at the bench and the defendant seated alone in the dock and only represented by their lawyer, does not allow the time for any underlying factors behind the offence to be revealed during the court process.

With the Magistrate and Koori Elders seated at the table on the same level, there is not only accommodation between the more powerful speaker and the less powerful, but in other linguistic communicative events, such as a change in speech style (or language variety) in which languages changes to fit the style of another speaker.[80]

In this court, this language change is demonstrated in the bicultural ability of some Aboriginal speakers such as Koori Elders and Koori Court staff. This skill enables them to

[79] See Transcript T10.71 (O).
[80] This language change is called a convergence. See Crowley, T and Bowern, C, *An Introduction to Historical Linguistics,* (2010). Oxford University Press, 269-272.

move between sociocultural groups in the courtroom, and it also is a powerful communicative tool that contributes to increased and effective interaction.[81]

On one day in the Koori Court, there was an example of this shared power, when the Magistrate left the bar table and went up to the Bench to complete the orders for her sentencing decision. Although the Magistrate always encouraged communication during the hearing, when she left the table on this day there was a marked shift in the power relationship from the Magistrate to the participants seated at the bar table. The body language of all at the table changed, and all visibly relaxed as they found mutual interests to discuss, such as the recent results of their competing footy teams, and the latest Koori news. This Magistrate later observed that she encouraged this.

> One of my favourite parts of Koori Court, and I think I'm the only Magistrate who does this[82] – I don't like to have the computer at the table. I find it really distracting, and it ruins that feeling that we're having a yarn around the table when the computer is sitting there, so I go and make the orders up on the bench, and I say – 'just talk amongst yourselves'[83]

> So I like to eavesdrop, and so – 'the Magistrate's not there and we can just completely relax now – the hearing's over'. They'll have a yarn – I absolutely love that. I love hearing the conversation, and I love not being part of it, but being an observer.[84]

Several respondents commented on the powerful words of the Elders. This was illustrated one day by the Magistrate, who said that

[81] Eades, D, 'Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations' (2015), in *Precedent,* 126, 44-48. January/February; Stroud, N, 'The Indigenous Koori Court: Challenging Linguistic Conventions' (2017). Paper presented at the 13th Bicentennial Conference of the International Association of Forensic Linguists, Porto, Portugal, 10-14 July, 2017.
[82] I observed several culturally aware Magistrates who prefer to sit at the bar table without a computer. They commented that conversation around the table improved when this occurred. (anecdotal). A further point is that if the Magistrate at the bar table closes the computer, this gives a powerful message that all are equal at the table. It also demonstrates that what went on before the courts (ie prior convictions) is a closed book. The open computer may detract from the 'conversation' process around the table.
[83] Transcript T29.60 (M).
[84] Transcript T29.64 (M).

> somebody from the body of the court came up and introduced themselves and shook her hand (the hand of one of the Elders) and said 'what you said is unbelievably powerful, and I didn't believe in this mumbo jumbo before, and you've completely changed me.[85]

Eades considers that 'cultural differences in the courtroom have important implications for the delivery of justice to Aboriginal people'.[86] My data substantiates this.

3 *Process*

The less formal process of the Koori Court requires a different style of advocacy to mainstream court. It encourages the defendant to be part of the 'sentencing conversation' and to tell their story in a culturally sensitive safe place. Respondents said that this is something they would not be able to do in the more formal mainstream court.

One lawyer noted that in the Koori Court

> the more informal you are, it tends to speak – it speaks louder in the Koori Court.[87]

One Magistrate made the following point about the language used in the Koori Court

> in relation to the language, legislation actually requires that the court be conducted in an informal manner, and in a manner with as less formality as possible to ensure that the accused understands.[88]

Prior to the day of hearings, the Magistrate sits down with the Elders and goes through the days' cases. This is an opportunity for the Elders to ask any questions and clarify the issues anticipated in the Koori Court list. According to one Elder

> Yeah – well we sit down and go through the file, which is the normal practice
> We all get a file. We get a background[89]

[85] Transcript T29.86 (M).
[86] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 179.
[87] Transcript T14.16 (L).
[88] Transcript T3.6 (M).
[89] Transcript T4.49 (E).

At the start of the day's hearings, the Magistrate and Elders enter the courtroom together and then the hearing commences. This differs from the more formal mainstream court where everyone stands for the Magistrate to enter or leave the courtroom.

As previously discussed, the Magistrate commences with a Welcome to Country before introducing the defendant, usually on a first name basis, to all persons seated at the table. In the case of a defendant appearing in the Koori Court for the first time, the Magistrate asks one of the Elders to explain the cultural context of the Koori Court, and to emphasise that prior to its commencement, the court has been' smoked' in accordance with Indigenous cultural tradition. Defendants said that this made them feel that this was a place where they were able to sit down and have a yarn with the Magistrate and their Elders about their problems and have their story heard.[90]

In the view of one defendant who had spent a long time in mainstream courts and various prisons before coming to the Koori Court

> When you walk in there, by them sitting there already it sets you at ease. (…) It's more for me – not knowing what's going on. With the mainstream court, it's just – rock up – whatever's happening that day – bang, bang – it's not personal – it's more – to them it's a business. Whereas in the Koori Court, it's personal, and they're not just dealing with a number – they're dealing with their own kind.[91]

On one day of hearings, the Magistrate carried out the Welcome to Country only once, for the first case of the day, rather than for each hearing.[92] This appeared to be an isolated case, and another respondent, a lawyer, commented that some Magistrates take a while to get used to how the Koori Court works. The lawyer explained that as more Magistrates sit in the Koori Court, the better they get.[93]

[90] Transcript T9.79 (D).
[91] Transcript T9.34 (D).
[92] Transcript T7 (E).
[93] Ibid.

> I notice that some Magistrates when they first start, take a little while to actually get used to how Koori Court works, because I think Magistrates are very used to (thinking) 'this is my court – I run my court' but yet there's a certain amount of – you have to let go a little bit in Koori Court, because actually – it's still the Bench's court, but it's more of a cooperative situation. So I think as Magistrates sit in there longer and longer, until you get better and better[94]

The lawyer added

> In fact, I would say in Melbourne, um all of them are pretty good. We've got a Bench that really gets what the Koori Court's about.[95]

Most Magistrates are aware of the importance of understanding and communication during the court process. One Magistrate explained

> In the Koori Court, we've got the advantage of asking (the defendant) directly and then we can clear up anything that is not clear. (…) One of the benefits of the Koori Court is that because the process allows them to have a voice, they feel much more comfortable about saying that they don't understand something, or they're not clear on something. So that makes it a lot easier, because I think by the end of the process they are much more prepared to speak up and ask questions about what's happening[96]

Conversation is an important part of the process in the Koori Court. There are times when a Magistrate has to moderate the adversarial style with a particular participant. During one case observed, a lawyer, who was not a regular in the Koori Court, tried to take control of the hearing right from the start

> Your Honour … I'm not advocating what has to be … (but) what my position would be at the end of the day …

The Magistrate on this day appeared rather taken aback and said

> we've jumped right into this (the hearing), but - we must proceed. Can I just …

[94] Transcript T14.52 (L).
[95] Transcript T14.56 (L).
[96] Transcript T3.2 (M).

The lawyer started to interrupt again as the defendant was brought from custody between two guards to the bar table. However, the Magistrate was quicker this time and began the usual protocols with the Welcome to Country, acknowledged the Elders past and present and introduced herself to the defendant. Her authoritative declaration that 'this is a conversation' was not only to the defendant, but set out to the lawyer what was expected of ALL participants.[97]

Another participant had a lot to say about how an improvement could be made during the court process. He suggested that support services relevant to each case should be notified so that they are present in court on the day.[98] Over the years of my attendance at court hearings, I found that when this occurred, the defendant was able to put a face to a name and establish a connection with the support service. This led to a marked improvement in attendance at appointments.[99] However there are difficulties. It does require liaison between court staff and agencies prior to the day's hearing and, if there are delays in court proceedings, it is not ideal for agency staff to sit around in court all day, unable to attend to other work.

In the Koori Court there is a fundamental goal of making the experience of coming to court meaningful for the defendant. The difference to that of an adversarial court is that because the defendant has pleaded guilty, the aim is to help them acknowledge and take responsibility for the offence and to change their behaviour, rather than end up in prison, which has little deterrent or rehabilitative effects.

One sentencing option which is available for Magistrates in the Koori Court is Judicial Monitoring, an option to actively manage and monitor an offender's compliance of a Community Corrections Order (CCO).[100] Judicial Monitoring appears to be very successful in keeping attendance levels on track for defendants to return to court. It is the practice for the defendant to return to the same Magistrate who has presided in past cases, so there is continuity. One of the Koori Court Officers explained that some defendants in

[97] Transcript Notebook 34, Court No. 59.
[98] Transcript T7.59 (E).
[99] Transcript T8.33 (S).
[100] For a definition of Judicial Monitoring, see <www.judicialcollege.vic.edu.au/eManuals/VSM/7157.htm>.

the Judicial Monitoring program return to Koori Court in several stages as they struggle to change their ways.

> That just goes to show how much (name) has grown personally, having a long stint there, fallen back in a hole and come back and given himself that second chance. You've got to be really persistent, and he has.[101]

In this court, the offender is given the opportunity for a second chance or more, if they are willing to accept responsibility for their actions and change behaviours. However, they do need ongoing support, especially after sentencing.

4 *Time*

It is clear that in the Koori Court, extended hearing time is a significant factor in the communication process. The Magistrate allows time for the defendant to tell their story, and time for the Koori Elders to listen to their story and advise on cultural matters.

One Magistrate observed

> Just the fact that we only list 5 matters[102] means you've got plenty of time and we're not pushed for time in terms of exploring things. (…) We can defer sentencing so we are not finalising matters on the day. We give them the opportunity to research their culture, do drug and alcohol, do what they've promised the Elders, and bring their response back to the Elders on what they need to do. Sometimes the Elders will ask them to look into their history and find out what their connections are.[103]

This is a significant difference to the formal mainstream court, where the high number of cases heard in one day (sometimes up to 80 cases) do not allow extra time to hear from the defendant at all.[104] As previously noted, following an increased number of people on

[101] Transcript T10.46 (O).
[102] This interview was conducted in 2015. Since that time, the number of cases heard in the Koori Court has increased substantially. On some of the days in court during 2017 there were ten or twelve cases listed for hearing.
[103] Transcript T3.48 (M).
[104] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011). In Proceedings of The International Association of Forensic Linguists' Tenth Biennial Conference, Aston University, Birmingham, 117.

remand and in prison due to changes in legislation, all courts have a higher number of cases which pass through both mainstream and Koori Courts in a day, and this puts more strain on the court and participants.[105]

In the last six years, the caseload in the Victorian Magistrates' Court has increased dramatically, while the number of Magistrates has barely risen. According to Magistrate Pauline Spencer

> Magistrates are working as hard as possible to avoid lengthy delays, but the daily caseload has become too large, and time pressure makes it challenging to deliver justice fairly[106]

The Courts have recently fast-tracked measures to deal with the punishing workload as a health and safety issue.[107] In addition, the Judicial College of Victoria conducted a survey of 152 Judges and Magistrates from five jurisdictions to try to understand the nature, prevalence and severity of work-related stress in the Judiciary. The survey found that 'more than 90 per cent of those interviewed identified workload as their major source of stress'.[108]

In the Koori Court, lawyers agreed that time spent prior to the court hearing, and more time allowed for the case to be heard, leads to a more appropriate sentence for their client. Allowance for this cultural practice takes additional time. One lawyer observed

> The good thing about Koori Court that you don't get with your mainstream clients is generally you've got a lot more time with your client leading up to Koori Court. So you've had them with you a few times before getting into the Koori Court so you've built that rapport. You're explaining to clients along the way (…) and you can sort of check – 'wait a minute, I don't think he really understands what's going on here'. Whereas in mainstream, often, because they don't say anything, and they're sitting behind you, you can't even see them. You don't know whether they don't understand it or not.[109]

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[105] Magistrates' Court of Victoria, Annual Report 2016-2017, 16.
[106] Younger, E, 'Inside Victoria's courts as Magistrates' 'oppressive' caseloads pile up', (2018), *ABC News*, <www.abc.net.au/news/2018-11-07/victorian-magistrates-under-pressure-court-caseload-increases/10460176>.
[107] Wilmoth, P, 'Judge Dread', *The Age*, August 4, 2018, 17-22.
[108] Ibid, 20. For further information, see Judicial wellbeing project adviser to the Judicial College of Victoria provides education programs for judges and magistrates <www.judicialcollege.vic.edu.au>.

[109] Transcript T14 (L).

However, this raised another point about fairness in the time taken for each case during the day's hearings in the Koori Court. Some respondents thought that certain cases continued for a very long time, especially with a very talkative defendant who wanted to speak at length about his life.[110] The flow on effects meant delaying hearings listed later in the day.

These respondents asked 'Is it fair that some defendants take up a lot more time than others?'[111] One comment was made that it is up to the Magistrate to move the conversation along and finalise the hearing.

> I often think we should have an egg-timer on the table.[112]

However, the amount of time allocated was observed to be relevant to the complexity of the case. According to one respondent

> I think the process of booking into the Koori Court and there being so many on the list and only so many hours in the day, and you can't allocate a certain amount of time to one client. So I think that is quite varying and some clients deserve a bit more time, and that's just the process, depending on what discussions do happen. But yeah, I think aside from that, the most important thing is listening[113]

In spite of this, time remains an important factor in the Koori Court. More time gives defendants the opportunity to tell their story during the court hearing and engage with their Koori Elders. There is also more time in this court for the Magistrate to hear all the factors which may have led to the offence, and consider an appropriate sentence.[114]

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[110] Transcript T22 (D).
[111] Ibid.
[112] Transcript T6.96 (PP).
[113] Transcript T8.63 (S).
[114] As previously mentioned, the increased hours in the day of hearings may be a problem in the future for the health of Judicial Officers in both the mainstream court and Koori Court. For further information, see Wilmoth, P, 'Judge Dread', in *The Age,* 4 August 2018, 18-22.

C *Communicative Style*

As previously noted in Chapter 4, there can be some overlap between pragmatic and communicative features when analysing the way people speak in the courtroom.[115] In her extensive research on Indigenous communication, Eades explored 'communicative style' and the importance of understanding differences between speakers

> Communicative style focuses on how we say things, and misunderstandings can occur during a formal court hearing when the defendant uses a different way of communicating to the magistrate or lawyer, and is unsure of the court process.[116]

She cited the work of Koch (1985,1991), which first drew attention to a number of problems with communication difference in land claim hearings, (…) often unrecognised - in grammar, accent and word choice and meaning.[117] In the Koori Court there is an awareness that if certain pragmatic, semantic or syntactic features are avoided (such as tag questions, specialised legal jargon), communication is improved between all participants.[118]

In the mainstream court, there may be a lack of cultural understanding of intended meaning which may impede communication due to different social constraints.[119] This is modified in the Koori Court; responses of defendants show the sharing of stories was significant in their engagement in the court process, in contrast with the more formal format of the conventional Magistrates Court.

Observation of the communicative process in the Koori Court also revealed that the bi-cultural ability of several participants who sit in the Koori Court considerably enhanced the interaction between speakers. A person with bicultural ability has the ability to participate in two or more sociocultural groups, in this case, the interaction between

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[115] See Chapter 4, Section IVB for further information on identifying barriers to communication.
[116] Eades, D, 'I don't think the lawyers were communicating with me: misunderstanding cultural differences in communicative style' (2003), *Emory Law Journal,* 52, 1109-1134.
[117] Eades, D *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press,111.
See also Koch, H, 'Language and Communication in Aboriginal Land Claim hearings' (1990),in *Australian Review of Applied Linguistics,* Series S, 5, 1-47.
[118] Stroud, N, 'New Developments in Language and the Communicative Process in an Indigenous Sentencing Court' (2011). Paper presented at the Australian Linguistic Society Conference 2-4 December 2011, Australian National University, Canberra, as part of the Canberra Langfest, 2011.
[119] Blum-Kulka, S, et al, *Cross Cultural Pragmatics: requests and apologies* (1989), Ablex Publishing.

Aboriginal and non-Aboriginal participants in the Koori Court.[120] This was evident in cases I observed when a Koori Magistrate, Koori Court officer and Koori Elders were present, together with culturally aware non-Aboriginal participants.

As one lawyer explained

> The Koori Court has a completely different advocacy style to the mainstream court. It is a lot less formal and has a greater impact on interaction and communication, especially with the Magistrate and Elders. It is a complete opposite in the mainstream court where 'the more professional and more attuned to the jargon that you can be, generally the better reception you will get in the court'.[121]

1 *Linguistic Features*

A number of aspects in my earlier discussion touched on different problematic aspects of courtroom interaction. For a speaker to perform an illocutionary act,[122] there must be a speaker and a hearer. Speech acts can be direct or indirect, but communication between a speaker and hearer must mean something for there to be understanding. [123] Searle defines speech acts as 'an utterance expressing an intention, a purpose or effect'.[124] A speech act can be expanded further, as it can have many other attributes such as a promise, an intention, a greeting, a warning or an invitation.[125]

As discussed earlier in Chapter 4, an example of a direct speech act in the formal courtroom is the question/answer format. This can be confusing for an Aboriginal speaker who is used to indirect speech and the use of subtle cues of discourse.

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[120] See further on bicultural ability in Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 13.
[121] Transcript T14.16 (L).
[122] An illocutionary act is the communicative effect of an utterance. It is characterised by a particular illocutionary force, such as a promise, a warning or a directive, and so on. It is a culturally-defined speech act type, as defined in Crystal, D, *The Cambridge Encyclopedia of language* (1987), Cambridge University Press,
[123] Allan, K, *Natural Language Semantics* (2001), Blackwell Publishers, 44.
[124] Searle, J, 'Indirect Speech Acts' (2008). In Martinich, A (ed), *The Philosophy of Language,* (5 ed), Oxford University Press, 182.
[125] Ibid.

When there is marked difference in cross-cultural understanding, miscommunication can result. In Victoria, most Aboriginal speakers speak Standard Australian English, with the main subtle differences in language being socio-cultural and contextual differences.[126] My data shows that language in the Koori Court is more culturally specific and less formal than the more formal mainstream court. This has a marked effect on participation in this court.

Participants revealed a variety of responses on how miscommunication in the mainstream courtroom context is ameliorated in the Koori Court. In this section, responses are further broken down into verbal and non-verbal instances of some of the factors which demonstrate the way language works in this court. There may be subtle differences between Aboriginal English and Australian Standard English – not just differences in the use of words and meaning, but cultural differences which are innate.

One interesting finding showed a merging of Aboriginal English, Standard Australian English and Legal English in the language used during courtroom discourse in the Koori Court. Several participants who sit in the Koori Court are Indigenous speakers and bring an Indigenous style of speaking to the discussion. Their bi-cultural ability to communicate between cultures accommodates for the wider use of narrative.

(a) Adaption of Legal Register[127]

The formal legal register or language of the mainstream courtroom discourse is adapted in the Koori Court by using a simplified communicative process which recognises the narrative format and group consensus of Indigenous participants. The offender has a 'voice' in proceedings and can tell their own story in their own way. According to Behrendt 'storytelling is a way of reasserting the Indigenous voice, perspective and

[126] Eades, D, 'Taking Evidence from Aboriginal Witnesses Speaking English: Some Sociolinguistic Considerations' (2015), in *Precedent,* 126, 45.
[127] In linguistic terms, the legal register is an important pragmatic feature that describes tone and attitude in the formal process.

experience.[128] The Koori Court thus becomes a meeting place between three cultures - Indigenous, Western Tradition and Legal cultures.

There is attention to legal process, but language is simplified and explained, with constant checks for understanding by the Magistrate, who explains

> there's just a much better understanding of the people who come before the court, so if you better understand the offender, you better understand the reasons for the offending, you better understand what needs to change to stop the offending to reduce the incarceration of them. And because you have time to defer sentencing, we are not required to sentence immediately[129]

It is very important to be aware of speaker / hearer relationships and ensure that the speaker is clear so that the hearer understands what is being said. For example, legal and Latin phrases which may be used in the more formal mainstream court, such as 'committal proceedings', 'aforementioned arraignment', 'mitigating circumstances', are replaced with simplified language in the Koori Court which the hearer understands.

One defendant compared the language used in the mainstream court with that of the Koori Court

> (in the mainstream court) You'd be sitting there and they'd be going through all the charges and some section this or that and they're like – I'd want to say something, and then the solicitor would be like – no not yet, and then 'what's this mean'? and he's like – it's more like 'I'll tell you after' – and I'd be pissed off anyway, and you're walking in the court and you'd just want to leave now[130]

This defendant said he felt different in the Koori Court

> Like, I think just how it's kept simple and like I was saying earlier on, you know – you walk in there – you've got (the Koori Court Officer) and the Elders and we're all sitting at the table – it's like we're all having a yarn. You know – it's like that[131]

[128] Behrendt, L 'Indigenous storytelling: decolonizing institutions and assertive self-determination: implications for legal practice', (2019), in Archibald, J, Xiiem, Q, Bol, J, Lee-Morgan, J and De Santolo, J. (eds), *Decolonizing Research: Indigenous Storywork as Methodology,* Zedbooks,175-186.
[129] Transcript T3.58 (M).
[130] Transcript T9,73 (D).
[131] Transcript T9.79 (D).

When the legal process is adapted, the defendant feels they are part of the action, with people who will listen to their story.

Responses on whether the language in the Koori Court is difficult or easy to understand prompted one Elder to observe that it depended on the Magistrate.

> some of them talk legal legal legal, (…) not breaking it down into a language – layman's language, that people can actually understand.[132] Ah – we have Rose Falla (the first Koori Magistrate appointed in Victoria). She's able to speak to the people in a language that they can understand[133]

(b) Recognition of implicit or indirect signals

Gumperz coined the term 'contextualisation cues', a feature that functions as a signalling marker which serves as a guide post for understanding information on the goals and outcome of a conversation.[134] Contextualisation cues are the means by which speakers signal and listeners interpret, and are an invaluable tool in the monitoring of the progress of conversational interaction in the cross-cultural Koori Court.[135]

An example of this is that communication is effective in the Koori Court when differences and similarities in the use of language are recognised, such as the use of indirect speech by Aboriginal defendants in the way information is sought. Communication is also enhanced when cultural differences such as different world views, beliefs and behaviour are better understood. As described earlier in the chapter, when there is shared background knowledge and respect between all participants at the court hearing, this has an impact on the perception of justice for an Aboriginal offender in the Koori Court.

(c) Effective speaker / listener techniques

The importance of listening by all seated at the court hearing in the Koori Court cannot be underestimated. Data gathered for this research supports this conclusion. Participants

[132] Transcript T4.35 (E).
[133] Transcript T4.39 (E).
[134] Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press, 131.
[135] Gumperz, J and Cook-Gumperz, J. 'Introduction: language and the communication of social identity' (1982). In Gumperz, J. (ed), *Language and Social Identity,* Cambridge University Press,18.

listen to the defendant tell their story and provide feedback. In this way, the Court better understands the story and miscommunication is averted. In the mainstream court, there is rarely time for this to occur.

In her response, the CISP support person also emphasised the importance of listening

> I think that there is a lot of listening that happens around the table which is really important, and especially when the client is given the opportunity to talk, like when everyone sits back and there's just the client and everyone's listening to their story, and you know that's validating the person with a consensus and I think that's really important.[136]

My findings showed that during the court hearing, participants listened politely to the speaker, and allowed time if there was a pause for the person to gather their thoughts, before moving on with the conversation. In this court there was also an awareness of subtle cues of discourse such as the use of indirect speech. Aboriginal speakers tend to use indirect speech, skirting around a topic, especially if they don't agree. Eades suggests that there may be subtle and not so subtle differences which can result in miscommunication in the mainstream court.[137]

However, one point to note regarding communication in this court is whether all at the table are able to hear the conversation. Some Elders appear to have some difficulty, especially if the defendant has a soft voice. As previously noted in Chapter 4, the percentage of Aboriginal people affected by hearing loss is very high.[138] This affects both Koori Elders and defendants, and this is where a greater awareness by participants, together with a process to address disadvantage, allows for participants in the Koori Court to have a voice and be both an effective speaker and listener at the court hearing. Defendants can tell their story and provide background information to the offence, which often includes a story of disadvantage. After others at the table have spoken, they are then able to listen to the cultural advice and support of their Koori Elders and hear strategies to change their ways. This tends to support the sense of achieving justice and accountability.

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[136] Transcript T8.63 (S).
[137] For further information, see Eades, D, 'Taking Evidence from Aboriginal Witnesses Speaking English: Some Sociolinguistic Considerations' (2015), in *Precedent,* 126, 45.
[138] See Chapter 4, Dr. Munya Andrews, speaker at Indigenous Hearing Loss Seminar, 5 March 2012.

Of course, not all communication includes speech, as the next section will show.

2 *Non-verbal communication*

Non-verbal communication can be a very powerful way to express a positive or negative attitude. As is the case for all speakers, Aboriginal people have a rich non-verbal system of communication which gives them a feeling of being comfortable with each other.[139]

Non-verbal features of language observed in the courtroom, such as changes in body language or attitude (gestures, shrugs, paralinguistic signals); lack of eye contact; or differences in the use of silence, must be interpreted in context. In the mainstream court, if any of these features are present, the defendant may be seen as uncooperative or showing signs of guilt, and this may lead to a breakdown in communication.[140] However, in the Koori Court, when there is an understanding that these features are part of a socio-cultural difference in language and cultural interaction, communication is enhanced.

One non-verbal linguistic marker of interest was the body language of one defendant who sat stiffly in the chair opposite the Magistrate and Elders without reacting during the reading of the charges by the prosecutor.[141] It took the Koori Court Officer, who had some knowledge of the defendant's circumstances, to speak gently to the defendant about their life. The Koori Court officer then told their own story and how similar difficulties had been overcome. This led to an opening up of the narrative and the Court was more fully able to understand factors behind the offence. The Magistrate was therefore able to make a more informed decision on the sentence.[142]

(a) Attitude

[139] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 82.
[140] Stroud, N, Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011). Paper presented at the Tenth Biennial Conference of the International Association of Forensic Linguists, July 2011, Birmingham, UK.,116.
[141] Transcript T30 (D) see Notebook.
[142] Transcript T17 (O) see Notebook.

My data shows that in the Koori Court, the lawyers are generally mindful of the attitude of their client when they come to court, and how an attitude can change if the focus is on the client feeling that they are being heard. One lawyer commented that

> when the sentencing conversation focuses on the strengths of the client and acknowledges the difficulties they've had in getting here, (…) the order gets complied with[143]

One of the Elders also gave an example of how a defendant can have a change in attitude in the Koori Court. He said

> They have to look at you (across the table), and then sometimes they get upset with you, until you explain to them the question you've asked them.[144]
>
> I'll give you a good example. We had a young fellow who wasn't keeping his commitments to his order – he was looking after his two kids, and he was looking at jail, and I said to him – 'do you love your kids?' And he said 'yeah'. And I said 'how much?' and he stood up and said 'how dare you ask me that question'. And I said 'sit down. You love your kids, but do you love them enough?'
>
> Then I said 'you kick back and apply for your permission order (or) you'll be going to jail for 12 months or more and you won't see your kids at all'. He said 'Oh right, Thank you'.[145]

When cross-cultural education programs have been conducted in areas of the justice system, this has contributed to an increased positive attitude of participants in the courtroom.

The following table demonstrates the results of my findings, showing a marked change in the attitude of most participants in the Koori Court over the research period.

Participant	Past Attitude	Present Attitude
Magistrates	Used to be formalistic and adopt authoritative stance	Magistrates now set clearer goals. Most are committed to the Koori Court program. One or two remain set in their ways.
Koori Elders	At first, unfamiliar with legal process in the court system.	Over the years Koori Elders have gained increased confidence. Their knowledge

[143] Transcript T14.58 (L).
[144] Transcript T4.141 (E).
[145] Transcript T4.143 (E).

		of Aboriginal culture and kinship is invaluable in the administration of justice
Lawyers	Lawyers with experience in the formal court process needed to adapt to a cross-cultural informal process.	Most lawyers, after cross-cultural education, now have an increased awareness of the difficulties faced by their clients. Some attitudes are still found to be variable when a lawyer only infrequently attends court.
Defendants	In the formal mainstream court, defendants generally do not take part in the court process. They rely on their lawyer to speak for them.	Some profess to be very willing to change behaviour. Judicial monitoring helps the defendant to continue their progress and be accountable to the Magistrate at a future date. Others have problems in giving up old associations and bad relationships. Encouragement by the Elders and others have had good results with rehabilitation.
Police	The role of police prosecutor in the mainstream court is in a formal capacity. They read out the charges at the start of the hearing, and do not interact with the defendant.	The attitude of police prosecutors in the Koori Court is for the most part exemplary. Those who successfully interact, tell their own stories and showed encouragement to the defendant. They show a good example of policing. Others not so familiar with the Koori Court process do not divert from their role as police prosecutor.
Support services	Support services are offered if needed at most hearings in the mainstream court system. However, the defendant may not know the name or the face of the person assigned to them.	CISP support staff are all dedicated in their support of their clients. Some external support services participate well in the early years of the research, but this has waned over the past few years. This may be explained due to increased workloads in the court system and the waiting time for defendants to be brought to court. However, my research shows that this is one of the four key areas vital for successful rehabilitation for the defendant, to see a face in court and know the name of a future support person.

Table 1. Attitudinal changes of participants during the period of the research

The following exchange illustrates how the Magistrate interacted with one defendant whose angry attitude had caused him to come back to court.[146] This exchange provides some background to the case, and illustrates the interaction at a Koori Court hearing and the importance of listening to the storytelling.

[146] Transcript T21.13-69 (D).

Case 1

13 Magistrate: On my first appearance with you (…) I put down here that you were a very angry young man.

14 Defendant: Yes.

15 Magistrate: I know 'Aunty Ruth' told you (that) you need to take some responsibility for your actions. I think we had this discussion?

16 Defendant: Yeah – there's another way.

17 Magistrate: Yep. So, the way getting angry has led to a breakdown of accommodation, so it has an impact upon you that is more than just being angry and having the difficult feelings to cope with. It actually leads you to becoming homeless. So that's why it's so important that you do understand that that anger and those feelings are legitimate – they just need to be dealt with in the appropriate way. (…) There's a whole lot of practical strategies, but of course you've got to deal with the underlying reasons as to why. OK? And sometimes those reasons are not your fault. It's the way things have happened in your life. But you get to a stage where we now have to take responsibility for them.

18 Defendant (soft voice) (indistinct) the directions?

19 Magistrate Yep. So I'm glad to see that first of all you've responded as you did this time instead of getting angry, which is good. You know – last time if I said this to you – you might have not reacted so well.

20 Defendant (indistinct).

21 Magistrate No – I think you're doing really well. I think the fact that you continue to engage is another good sign. So I'm going to adjourn this matter for you to continue on the CISP program[147] (…) before I move to settle and put you on a Corrections Order.

The matter was adjourned while the defendant left the court to be assessed by CISP. He returned later in the day to resume the hearing.

67 Defendant I've got a lot of problems.

68 Magistrate And that's the difficulty at this early stage when you're not in a safe place. That will ease off when you actually get the home.

The Magistrate concluded the case by saying

69 Magistrate This is good 'Shane', and the way you have responded to what people have said to you today is like 100% on what you were like last time.

In this interaction, the Magistrate showed understanding, but reminded the defendant of his past agreement with the court, pointed out the impact that his anger had on his life,

[147] Court Integrated Services Program in the Magistrates' Court of Victoria.

and encouraged him to do better. However, she recognised that there were other factors involved, such as homelessness, and gave him a second chance rather than a prison term. This was a recurrent theme in many cases observed in the Koori Court.

In the second case, this involved an angry young man who had returned again to the Koori Court. This extract showed the defendant's attitude and the way all six of the court participants interacted during the hearing. In spite of some improvement, they realised the defendant was not ready to take responsibility for his actions. However, they listened to his story and encouraged him to seek help and stay in touch with his community. [148]

Case 2:

1 Magistrate: Since you first came to court I see a huge improvement. You relate well to your Elders. (The Magistrate then spoke to the court) - Thomas was a very angry young man when he first came to court.

2 Defendant: Still am – but I try to control it.

3 Magistrate: I'm concerned that you have to come here from (regional town). You're not suitable for a Community Corrections Order. It's important to appear before your Elders. It would be better at (regional court)?

4 Defendant: I don't like (regional town)! I'm living in (another regional town).

5 Elder 1: (spoke sharply to the defendant). **You're** (emphasized) the one who has to abide by the rules and get out of this situation. The Magistrate is trying to help.

6 Defence Counsel: Thomas and I have talked. He recognises he has a number of issues.

7 Magistrate: I think you need the support of your community in (regional town) where services are nearby. Contact the Koori Court Officer up there.

8 Defence Counsel: There is further offending – an altercation – adjourned at (another regional court). He's got a GP he's happy with.

9 Magistrate: Excellent. You need help from people. Find a date with (regional Koori Court). Extend bail to regional town.

10 Elder 1: Attitude is a good thing, but attitude can get you into a lot of trouble. Attitude and alcohol don't mix. (The Elder then called out to a friend of the defendant sitting in the back of the court) - 'Who are you?' The person replied: 'a friend – I know him by being on the streets – I'll talk to him'.

11 Elder 1: (to Defendant) - You made a comment that coppers are corrupt. That attitude won't get you anywhere. I wish you the best of luck to go back.

12 Magistrate: Thomas would have walked out the door initially.

[148] Transcript T33 (D). Notebook 35, Exchange 1-17.

13 Police Prosecutor: I completely understand **– BUT** …..(the body language of the Police Prosecutor disproved agreement).]

14 Magistrate: Your lawyer will follow it up. (Magistrate then asked the Koori Court Officer to give the defendant her contact details). There's still a lot of work you've got to do. Watch your attitude.

15 Elder 2: You've got to get help from people, not reject them.

16 Magistrate: Is there anything you want to say to your Elders?

17 Defendant: Thank you for being honest.

Throughout the conversation, the Magistrate and Elders all stressed the importance of the defendant seeking help. Even though some of the Elders and the police prosecutor were not totally convinced that this defendant was ready to cooperate and get the help he needed, the defendant still was respectful and thanked them for their honesty. The Magistrate and Koori Elders all rated honesty from the defendant as a priority.

> We congratulate you on your honesty – a lot of people would be pretending all sorts of stuff to us. We respect you are able to tell us what you've been doing and the extent of it.[149]

The above exchanges were meaningful as they showed the way communication in the Koori Court develops between participants. While the Magistrate was firm but conciliatory, the Elder was quite blunt in her reply and even called out to a friend of the defendant seated at the back of the court and included him in the discussion, gaining his support for the defendant in the future.

One of the lawyers said that he advises his client prior to the court hearing about their attitude

> Your attitude in this court is very much going to dictate how the conversation goes. So if you're open and frank and you remember that you're pleading guilty, so you are accepting responsibility, as long as we start from that starting point, the conversation is going to go well'.[150]

> So what you've got to do is no matter what's been said around that table, you can't bite, because if you bite the conversation will turn, and once it turns, then it becomes less of a sentencing conversation, more of a shaming conversation, and I think there's a place for both, but it can't just

[149] Transcript T12.102 (M).
[150] Transcript T14.66 (L).

> be about one or the other, and ideally, if it's just going to be about one of them, it should actually be about sentencing. [151]

Another defendant made the comment that a person must be at a certain point before they can successfully rehabilitate. Many promise to do so, but they must totally accept responsibility for the offence and be ready to change.[152] My findings show that those defendants who made a conscious decision to change their behaviour had the most success. They said they stopped their friendships with people who had been a bad influence. They also accepted the help of rehabilitation services recommended by the court.

The Koori Court Officer agreed with this comment, and gave the powerful example of another defendant who had made changes in his life.

> For it to really work (…), you actually have got to be ready for it. We get a lot of people who come through the Koori Court who SAY they're ready for a change, but when the things get going pretty hard for them they'll just crumble away, and it's just due to them not being ready. That's not a knock on the – it's not a knock on us, it's just when someone's ready they'll actually do the extra steps which (name) has done, which actually make those lifelong changes. You do get a lot of people that come in – they're on the right track for six months and they might bump into a cousin or you know, see someone who when they used to be associated with that they just fall back into that hole. So you've got to be really mature and be actually really ready for the actual progress to really start working.[153]

The attitudes of some of the Elders were interesting. Elders took their role very seriously, and were intent on stopping young Koories coming into the court and prison system.[154] One day in court one of the Koori Elders was heard to say to the defendant

> You should be sitting THIS side of the table.[155]

This showed a positive attitude of the Elders, and gave encouragement to the defendant that they had choices in life, rather than keep returning to the court system.

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[151] Transcript T14.68 (L).
[152] Transcript T10.39 (O).
[153] Ibid.
[154] Transcript T4.21-27 (E).
[155] Ibid.

Another Elder made the following observation

> I think I've got to the stage now there when I go to Koori Court, it's more about reflecting on why I'm actually there, what's Koori Court about in that sense, and so how to communicate that to the mob or the client on the other side of the table, so that if they can get some meaning and relevance out of it, and that's the bit that I struggle with and which I've found challenging – to … how do I say things in the right way for each person who comes through, 'cos they're all different, so that they can take something from it that's tangible.[156]

The above comment reflects the philosophy of the Koori Court.[157] My data shows that all people who sit in the Koori Court take their responsibilities very seriously. Their aim is to support the offender and encourage them to take responsibility for the offence and stop offending.

(b) Eye Contact

Lowered gaze is an interesting linguistic marker. In the mainstream court this is often thought to be a sign that the accused is uncooperative; however in Aboriginal culture it has been thought a sign of respect. According to Eades

> In many Aboriginal societies it is considered quite rude to look another person in the eye, especially if that person is older, whereas in mainstream society direct eye contact is usually taken as a sign of respect and honesty.[158]

In my interviews, respondents varied in their interpretation of the cultural significance of eye contact and the interpretation of a lowered gaze. Some Elders and Respected Persons said that the layout of the court, with the Magistrate and community Elders seated directly opposite the defendant, brought an accountability for the offence, and direct eye contact was an essential part of this process. Others said that they assessed

[156] Transcript T7.10 (E).
[157] According to Briggs and Auty, 'the Koori Court has a strong philosophical commitment to using alternatives to imprisonment'. For further information, see Briggs, D, and Auty, K, 'Koori Court of Victoria – Magistrates' Court (Koori Court) Act 2002' (2003), Paper presented at the Australian and New Zealand Society of Criminology Conference, Sydney, October 2003, 9.
[158] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 88.

the body language of the defendant and did not insist on direct eye contact if the person appeared anxious.[159]

One Magistrate acknowledged eye contact as a sign of respect, but conversely, one of the Elders said she insisted that the defendant look them directly in the eye to show that they were accountable for their actions.[160] Another Magistrate said that she never insists on eye contact with the defendant.[161] She did not elaborate the reason but was definite in this decision.

Each participant interviewed had a different view on why some Indigenous (and non-Indigenous) people thought as they did regarding a lowered gaze in interaction between speakers. One respondent thought that it stemmed from colonial days when the more powerful 'white boss' insisted on respect by the Aboriginal worker.[162] Another Elder agreed that in the old days, the head down was a sign of respect to your Elders.

> I always tell them 'head up'. It's kind of an automatic thing. Yeah. Respect your Elders.[163]

> They have to look at you (across the table), and then sometimes they get upset with you, until you explain to them the question you've asked them[164]

Further research may reveal some interesting patterns of variation in the cultural significance of eye contact in wider geographical areas of Australia.

(c) Silence

As foreshadowed earlier, silence is an important aspect of communication. Eades considers 'silence' as one of the two most relevant pragmatic features when examining participation of Aboriginal speakers during discourse in the legal process.[165] The Aboriginal use of silence can be an important factor in interaction

[159] Transcript T3.42 (M).
[160] Transcript T2.40 (E).
[161] Transcript T3.42 (M).
[162] Transcript T2.42 (E).
[163] Transcript T4.131 (E).
[164] Ibid, 141.
[165] Eades, D, 'Communication with Aboriginal Speakers of English in the Legal Process' (2012), in the *Australian Journal of Linguistics,* 32, 4, 473.

> It can also signal that people want to take time to think about an important issue[166]

In the mainstream court, if the accused is asked a direct question that for cultural reasons they cannot answer (for example when they are unable to speak of the name of a deceased person or sacred place), they may remain silent, and this is sometimes seen as uncooperative. Responses on the way silence is acknowledged in the Koori Court were in the main positive. However even though one of the Magistrates thought that acknowledgement of silence was important, she encouraged the defendant to respond to what the Elders said, so that the connection with their community was maintained. This Magistrate continued

> I think silences are important as well – I don't think it's just about the talking – I think one thing that I have noticed other times as well is that I'm now more ready to ask the person to actually acknowledge what their Elders have said. (…) They need to be encouraged to speak, and sometimes that's the most powerful when they actually respond to what the Elders have had to say. And I think if we let that go, then we lose that whole part of the connection between them and their community that wouldn't otherwise be apparent.[167]

3 *Narrative Structure (sharing of stories, group consensus)* [168]

It has already been demonstrated that in the Koori Court there is a conscious awareness of Indigenous speaking styles, such as different ways of information seeking, the importance of sharing one's own story, and the recognition of indirectness and subtle clues of avoidance of a topic.[169] Anthropologist Professor Linda Smith argues that 'Indigenous storytelling serves as an historical record and a form of teaching and learning. It is an expression of Indigenous culture and identity and centres around the politics of sovereignty and self-determination of Indigenous peoples'. Canadian Professor Jo-ann

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[166] Eades, D, 'Communicating the Right to Silence to Aboriginal Suspects: Lessons from Western Australia v Gibson' (2018) in *Journal of Judicial Administration*, 28 (1), 4-21.
[167] Transcript T3.46 (M).
[168] For further information on the power of Indigenous storytelling, see Archibald, J. et al (eds). *Decolonizing Research: Indigenous Storywork as Methodology*, (2019), Zed Books, and Smith,L, *Decolonizing Methodologies: Research and Indigenous Peoples,* (2nd ed, 2012), Zed Books.
[169] For further information on Indigenous speaking styles and information sharing, see Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press.

Archibald considers there is power in Indigenous storytelling. 'A culture's stories are a vehicle for hearing the perspective of these voices'.[170]

The findings of this study highlight the value of Indigenous storytelling as an important part of the communicative process in the Koori Court. My data shows that by sharing their own story, participants encourage defendants to talk about personal issues in their life some of which may have contributed to the offence. According to one Koori Court Officer

> We try and make (court) safe and welcoming as possible and make the client feel as comfortable to actually speak of their story, because we find that it's the ones who hold back (…) they're not actually sharing their story and not benefitting as much as they actually could be, so you've sort of got to put yourself out there, but we try and keep it simple and good language, just like you talk - if I speak to (name) down the street, I wouldn't talk any different to him than what I would in the courtroom.[171]

He explained the importance of Indigenous storytelling

> Yeah – that's really big not only in the Koori Court, but in the Koori community itself – that everyone has a say – that's really important, because when people hold back, people are just withdrawn to share their stories, because 'you're not sharing with me, so how do you expect me to share with you.' So if everyone sort of gives an input, you create a bond, and (when) a lot of people (say) – 'well I've been through what you've been through' – they don't know that – they're not going to tell you what they've been through, so you've got to sort of put yourself out there to get some feedback as well.[172]

The defendant is encouraged to tell their story, and this builds on a narrative of the case to reveal any background issues of disadvantage which may then be addressed in addition to the offence.

One of the lawyers thought it was a good idea for the defendant to bring someone with them to court to support the telling of the story.

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[170] As previously mentioned in the Introduction, Ch 1, p3 'it is important to incorporate the Indigenous voice in research that concerns Indigenous people.'
[171] Transcript T10.81 (O).
[172] Transcript T10.93 (O).

> Very often the client feels because they're there and because they're being shamed out a little bit and they feel like their story is either not going to be respected or if they're just too shy to tell their story, a friend or family can often tell my client's story much better than they can, and certainly a hundred times better that I could.[173]

4 *Lexico-semantic features*

When examining specific lexico-semantic differences in the conversation of Aboriginal speakers during face-to-face interviews and court hearings, an awareness of cultural difference in the lexicon is vital for all involved, but particularly for the non-Indigenous researcher.

Some distinctly Aboriginal terms used by speakers in the study were terms such as 'brother', or 'mob', which had much broader meanings than the AE equivalent. Collective terms of your mob', 'our mob', 'their mob' were used by Aboriginal speakers to identify other Aboriginal people or places. This was very important in establishing connections and relationships. Another cultural difference, as mentioned earlier in the chapter, is the use of the term 'Aunty' or 'Uncle' used by Koories as a sign of respect, when speaking with their Indigenous Elders.

One interesting feature which is usually evident in the conversation of Aboriginal speakers, is the practice of swearing. Swearing for an Aboriginal speaker is not a problem. This differs from the western speech norms. According to Eades

> One of the most common offences with which Aboriginal people are charged is that of using obscene language. (…) But the very notion of 'obscene language' involves a significant area of cultural clash between contemporary Aboriginal and mainstream Australian societies. (…) Swearing, like fighting, is considered to be a normal part of Aboriginal social interaction, and in particular a necessary part of settling disputes.[174]

Aboriginal speakers consider this a normal part of their discourse, whereas in standard English, there is usually much more constraint with some speakers especially in the legal domain. However, in the context of interviews and court recordings I had with Aboriginal speakers, I found that there were not many noticeable differences in the words and

[173] Transcript T14.74 (L).
[174] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press, 103.

phrases used in the dialogue of respondents which referred to specific slang or swearing. This suggests that the language of Victorian Aboriginal speakers, either in the Koori Court setting, or in a face-to-face interview, was not as unrestrained as when in the presence of their Koori mates.

Another difference in terminology which may be misunderstood, is the Aboriginal use of the word 'deadly', meaning 'awesome', 'fantastic', or 'great'. In Australian English, 'deadly' is something fatal, mortal, or causing death. However, at one hearing I attended, the Magistrate greeted the first defendant in the court with 'Good morning (name) – you're looking particularly 'deadly' today!'[175] This showed her understanding of cross-cultural differences in both terminology and meaning. This word was used in a positive manner at several hearings I attended, accompanied by much laughter.

Other examples of semantic differences observed in the data included slang terms for illicit drugs – 'yarndi' and 'gammon', and expressions which might be considered swearing in Australian English (or at least inappropriate in a courtroom), for example 'it's a pissing contest'.

One lawyer commented that he is quite sensitive to cultural practices, so he is careful when using certain terms.

> I tend not to use what I call Aboriginal specific cultural terms, like 'yarndi' or 'gammon' or something like that. But when I'm getting instructions from my client, absolutely I'll use those terms. If my client's using those terms with me, and I understand that's the best way I'm going to communicate, I'll use it, with their permission.[176]

He felt that unless he is given permission by his client to use elements of his language he will continue to use a term such as 'cannabis' as used in the prosecutor's charges.[177]

Shortening of familiar place names also occurred during dialogue between Aboriginal speakers, such as – 'Broady' for Broadmeadows, a suburb in Melbourne, 'Shepp' for Shepparton in regional Victoria. According to one Elder

[175] Transcript T19.1 (D). Conversation during court hearing on 19/09/16.
[176] Transcript T9.30-32 (L).
[177] Transcript T14.36 (L).

> You've got to talk about the language that's related to Koories, in general (…).[178] Some language used in the court is not printable (laughter). You can joke and talk about football and anything.[179]

D *Interactive Communication*[180]

This section brings together a number of the features foreshadowed earlier in the chapter which fall under the umbrella of interactional communication. One of the fundamental differences between the Koori Court and the formal mainstream court is the 'sentencing conversation' format, which is one of communication, interaction, and collaboration of all participants at the court hearing, with the aim of achieving a solution-focussed outcome for the Koori offender.[181]

In the Koori Court, the simplified communication between participants seated at the table, means that here the offender can tell his story, and there is time for all to listen to the narrative. In this court, the defendant is not just a summary of offences read out by the prosecutor. They have a story, a family and a future to consider. Defendants all agreed that the sharing of stories was significant in their engagement in the court process in contrast with the usual format of the conventional Magistrates Court.

The following is a story of one defendant's own experiences and interaction in both the mainstream court and the Koori court, which exemplifies the two court systems.

The defendant recounted his history of reoffending and moving in and out of the justice system and going through the mainstream courts since he was young. He had been incarcerated in several different prisons during that time. He had learned some skills and

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[178] Transcript T4.196 (E).
[179] Transcript T4.198 (E).
[180] Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press. As explained earlier in Chapter 4, my study has drawn on the work of anthropologist John Gumperz who developed an approach to the analysis of discourse, known as interactional sociolinguistics, which examines and interprets language in context.
[181] Stroud, N, 'Non-Adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011. In Proceedings of the International Association of Forensic Linguists' Tenth Biennial Conference, edited by S Tomlin, N MacLeod, R Sousa-Silva and M Coulthard, Birmingham, UK, 123, at http://www.forensiclinguistics.net/iafl-10-proceedings.

done a lot of courses in prison over the years, but each time on leaving prison he returned to his old life. He started to come to the Koori Court three years ago.

> I'd done like 8 or 9 months on remand and tried to get bail and didn't get it, and then I come in front of (name of Magistrate in the Koori Court) and she gave me that chance and then like – that's when I was starting the (Judicial Monitoring program) and then it does connect you with your people as well and it gives you that pride and coming back and forth and you start believing in yourself, 'cos you've seen the court – the Koori Court Elders and (…) they're reinforcing that, and you're hearing it from your own people – magnified. [182]

> It says volumes. I remember the time I asked (the Magistrate) during my monitoring, I remember – she's like 'you don't need it any more'. And usually I'd say – sweet - It's over and done with, and I'm like – no – I wouldn't mind another one. I wouldn't mind coming back and knowing that it keeps that connection.[183]

One respondent described the process

> In the Koori Court we strip the titles away and we become equal, and work as a team to get the best outcome. It's a chance for the client to share his or her story for themselves – not through a lawyer, so it really is very important'.
>
> In the mainstream setting (…) it's not about what's actually really happening going on with your life – it's 'come in – you've done this and you're in court – catch you later'. With the Koori Court it's more of a nurturing, safe place for people to come in and express what's really going on in their lives and what we can do to actually change that, and it takes a lot of time, but you've got to spend time to get that reward.[184]

This shows that by listening to the stories, all participants at the Koori Court hearing can invoke change in the life of the offender.

The following response regarding the interaction between participants in the Koori Court, describes the cross-cultural nature of the court

> In the Koori Court we focus on being equals, (…) and as Aboriginal people feel comfortable talking in a circle, we sort of try and implement that in our courtroom, so everyone is sitting on the same level and we're all equals and we're all working together as a team and I think that that's what really separates us from mainstream court – other than having the Elders and the other stuff that's involved – it's the layout

[182] Transcript T9.97 (D).
[183] Ibid, 100.
[184] Transcript T10.36 (O).

> of the table and the system of us sitting around, but we were really trying to keep things simple, because at the end of the day you know I'm here as a Koori Court Officer, but before I come to work I'm a member of the community, and that's really important for everyone to know as well, and so for the lawyers, the Magistrate, and everyone is a normal community member, so we sort of strip the titles away and we become equal, and work as a team to get the best outcome, and if that means talking a bit different to – I've been in mainstream courts, County and Magistrates', and I don't know what's going on and just how they talk and how the lawyers talk and for you – so it's a chance for the client to share his or her story for themselves – not through a lawyer, so it really is very important – language probably is a really big thing, and it's about making people feel comfortable.[185]

Not all defendants want to join in the conversation at the start of the hearing. Some are still overwhelmed coming to court, especially from custody. Some appear ashamed coming before the Koori Elders of their community. And the attitude of some who sit and stare straight ahead shows that they are not ready to take part in a conversation. However, according to one Koori Elder

> By the time we get to the final stage, they start speaking. Sometimes we get individuals who don't want to talk at all. But after half an hour or so they start talking, because I have said 'tell me about your country'? (or) 'Who's your family?', because sometimes the solicitors don't interview them until they get to the court[186]

Throughout this chapter, one of the important points which are revealed in the interaction of the Koori Court, is that the Koori Elders are particularly important communicators with Koori defendants, as they show a personal understanding of the disadvantages that can occur for an Aboriginal offender. On many occasions, the Elders have their own stories to tell of hardship and disadvantage, but are also able to show the defendant strategies to get their life back on track.

Many respondents considered that there was a cultural connection in this court and defendants said that it was important to have Koori Elders of their community present.[187] Magistrates expressed the view that 'the more that the offenders talk directly, the more

[185] Transcript T10.71 (S).
[186] Transcript T4.119 (E).
[187] Training and education are held in high regard in the Koori Court, not only for Magistrates, but for Koori Elders and other participants who sit in court.

we learn about not just their lives, but Koori life, and the more we learn about more effective communication'.[188]

As mentioned earlier, Eades suggests there are people who can choose the variety of English which best suits their purpose, such as bi-cultural speakers who have the ability to participate in two or more sociocultural groups.[189] My data shows that Aboriginal speakers who have participated in both Indigenous and non-Indigenous domains, can switch between Aboriginal ways of interacting and non-Aboriginal ways, depending on the context.[190] Several participants at the Koori Court hearing have had significant and long-term participation in non-Aboriginal domains, including the legal domain.[191]

III Conclusion

This chapter draws together the findings of the four key themes of inquiry emerging from the research. Actual language used in the Indigenous courtroom was evaluated and compared with the more formal language of the conventional court. In doing so, I drew together a selection of thematic responses to a range of questions on the kind of problematic language which can occur in the formal courtroom, and I was then able to demonstrate how these were addressed by the Koori Court.

The first of the four themes covered cross-cultural aspects of identity and differences in social mores such as politeness, recognition of cultural habits and kinship obligations. The second described the courtroom context with the cultural setting and redefined court process, notably a process with time for the offender to tell their story. The third theme discussed the communicative style in the Koori Court, in particular linguistic features such as recognition of indirect signals, the use of silence, and other non-verbal features such as attitude, gestures and paralinguistic signals. And lastly the fourth theme highlighted

[188] Transcript T25.6 (M).
[189] Eades, D, *Aboriginal Ways of Using English* (2013), Aboriginal Studies Press,13.
[190] Stroud, N, 'The Indigenous Koori Court: Challenging Linguistic Conventions' (2017). Paper presented at the 13th Biennial Conference of the International Association of Forensic Linguists, Porto, Portugal, 10-14 July 2017.
[191] Ibid.

the importance of the interactive communication, which showed an awareness of the Indigenous speaking style in the sharing of stories during the 'sentencing conversation'.

I argue that with this awareness, both Aboriginal and non-Aboriginal speakers appear to have adapted their ways of communicating, resulting in a linguistic shift in the discursive practice of all who are seated around the table. This is in marked comparison with the mainstream court.

Clearly this data supports my findings that the discourse in this court responds to changes in the linguistic style of speakers during the court process (as demonstrated in Table 1 of the chapter). There appears to be a linguistic shift in the cross-cultural conversation, with the bicultural ability of some speakers contributing to increased and effective interaction. This shows the extent of the effectiveness of the Koori Court process.

What the findings really highlight for us is the importance of the Indigenous storytelling in the court. When time is allowed for the Koori offender to tell their story, and all at the table listen, there is deeper engagement in the process.

In conclusion, this chapter has attempted to show how the Koori Court has adapted certain linguistic theoretical principles (as discussed in Chapter 4)[192]on the way language works in the courtroom, with empirical examples of how cross-cultural language speakers participate and interact in this court. While accepted linguistic theory may provide an answer for miscommunication in some contexts, it is the cross-cultural communication as observed in the Koori Court that is crucial here – it demonstrates that when there is awareness and understanding between speakers who do not necessarily share the same background, this enhances the narrative of the discourse.[193]

It is very clear that improved communication leads to a better understanding of the underlying context of the criminal act and the appropriate sentencing arrangements.

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[192] For further information, see Chapter 4 of this thesis, which discusses established and contemporary linguistic theories of communication.

[193] During the 'sentencing conversation' in the Koori Court, when there is an understanding of the issue, communication may be improved with the awareness that occurs. Awareness is brought about with education in cultural differences between Indigenous and non-Indigenous participants in the courtroom. All people who sit in the Koori Court undergo some training. Communication is improved when all court participants have an awareness of cultural and language difference.

This is a beneficial outcome not only for the offender but all the stakeholders in the administration of criminal justice.

CHAPTER 8 CONCLUSION AND RECOMMENDATIONS

I Introduction

In this thesis I have addressed the gap of knowledge regarding difficulties for Aboriginal offenders when they come in contact with the court system in Victoria. I have taken a novel approach to the problem of miscommunication which may occur between Aboriginal offenders and legal practitioners in the more formal mainstream courtroom. By applying linguistic principles, I compare the formal processes with communication as it occurs in the Koori Court, to show that the latter provides a more effective way of enhancing the administration of justice processes as they apply to Indigenous offenders.[1] In short, this thesis has taken a linguistic approach to a legal issue and a legal approach to a linguistic issue.

Accordingly, for this thesis, I have drawn on the work of legal and linguistic academics who have examined the difficulties of communication experienced by Indigenous Australians in the criminal justice system over more than thirty years. Difficulties for Aboriginal Australians in the prison system were highlighted in the well-known Report by the Royal Commission into Aboriginal Deaths in Custody in 1991, with its 339 recommendations to address the overrepresentation of Kooris in vital areas of concern such as over-incarceration and over engagement with criminal justice systems and personnel.[2] More recently, the 2017 Australian Law Reform Commission[3] reports that there has been inadequate reform at many levels to address the social determinants of incarceration.[4] Law reform alone is not sufficient to address the over-representation of Aboriginal and Torres Strait Islander people before the courts and in prisons.[5]

[1] For further information, see Chapter 4 of this thesis.
[2] RCIADIC Report, 1991.
[3] ALRC Final Report 2017, 133.
[4] Ibid.
[5] Ibid.

This chapter briefly reviews the four steps of the thesis which set out the framework of the thesis. It considers the issues from a linguistic perspective, viewing barriers of communication in the legal process through a linguistic lens.

The four steps progress through eight chapters, commencing with Step 1, the Introduction, which introduced the framework of the thesis and the background to the inquiry. The second step grouped together the next three chapters of the thesis, setting out the structure and rationale of the thesis and building the argument and the disciplinary nature of the research. Chapter 2 reviewed key aspects of the Australian Indigenous legal relations with the criminal justice system, with a background to some of the early colonial government policies that underpin contemporary problems for Indigenous people today; Chapter 3 reviewed the origin of the Koori Court and its place in the context of the justice system, beginning with the partnership program between the Victorian government and the Aboriginal community which led to the creation of this sentencing court; and the last chapter of the second step, Chapter 4 examined linguistic features of communication which occur in the Koori Court, setting out the linguistic theory and literature that ground the inquiry, and drawing on the works of legal and linguistic scholars who have examined cross-cultural communication between Aboriginal and non-Aboriginal speakers.

These early chapters establish the basis for the following chapters; many of the language differences occurring in the courtroom are subtle, and may be influenced by differing cultural beliefs, values and expectations. The formal, structured and legalistic process of the mainstream court is daunting for many Koori offenders, who may be used to different uses of English, an oral-based culture and greater reliance on group consensus (although this is not always true for all). It sets the scene for the inquiry into the extent that the interactive communication of the 'sentencing conversation' could have on the outcome for an Indigenous offender.

My findings in chapters 5, 6 and 7 offer new insights into the interactive process and practice of communication in the Koori Court, which gives the Koori defendant a culturally contextualised voice in the court system, in this way the Magistrate is able to access deeper information for consideration of a more appropriate sentence. This is the core contribution of the thesis. The

third step in the thesis comprised Chapter 5, the research methodology. This outlined my empirical field work, the various courts attended, and interviews and cases audio recorded and analysed, for an examination of the communicative process.

This was followed by the fourth step, which returned to the original objectives of the research to address the barriers of communication in the legal process through a linguistic lens. This step comprised three chapters containing my findings and this conclusion, Chapter 6, 'Voices from the Courts', bringing to life the personal stories of Aboriginal Australians and their experiences in the criminal justice system; Chapter 7, a thematic analysis of participants' responses, demonstrating the importance of 'listening to the voices' in the court process, and contributing to an understanding of some of the broader social issues involved in Indigenous disadvantage; and finally, Chapter 8, which now concludes the thesis and draws together the research and makes some recommendations.

The key thesis is thus that an understanding of the cross-cultural language as used in the Koori Court, clearly shows how effective communication may be achieved between Aboriginal speakers and legal practitioners in the court environment, leading to an improved sentencing outcome, based on fuller information and engagement in the processes.

II Research Process

The communicative process was examined using an empirical approach to identify the extent of cross-cultural and language awareness in the discourse between Indigenous speakers and legal practitioners.[6] My methodology involved empirical field work, with a selection of courts chosen and attendance at more than 200 court hearings throughout Victoria in regional, urban and city locations to observe socio-cultural and geographic variation. Due to strict length requirements of the final thesis, this was later narrowed to a selection of adult Koori Courts and a comparison

[6] Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press; Eades, D, 'Legal Recognition of Cultural Difference in Communication: The Case of Robyn Kina' (1996). In *Language and Communication,* 16, 215-227.

with the formal mainstream court. Face-to-face interviews and selected hearings were audio-recorded, transcribed and linguistically analysed.[7]

III Presentation of Findings

My findings in Chapters 6 and 7 elicit some of the communicative issues raised in Chapter 4 regarding differences in process and practice between the mainstream court and Indigenous Koori Court.[8] Chapter Six, 'Voices from the Courts', introduced a human face to the court communicative process, and presented some of the personal stories of Aboriginal Australians who are caught up in the criminal justice system. The responses of all defendants in the Koori Court were consistently positive about the opportunity to come before their Elders in the courtroom and tell their story. The chapter highlighted a number of comparisons between the mainstream Magistrates' Court and the Koori Court, painting a picture of the courtroom and process through the eyes of the various participants. The redefined roles of participants in the Koori Court were explained, and examples given, as to how this enhanced the communication process. Defendants reported that they felt 'safe' in the cultural setting of the Koori Court, seated before Elders of their community, with people of their own kind.[9]

Case studies in this chapter exemplified some of the particular voices heard in the Koori Court. The first case study entitled 'Behavioural Change', demonstrated the impact that the Koori Court had on one Aboriginal defendant who pleaded guilty to the offence. After returning to the Koori Court several times, and with on-going support, the defendant was able to turn his life around. He was given a second chance, and able to use it to avoid reoffending. The second case study encapsulates the importance of the Koori Elder in the interaction between the

[7] For detailed information, see Chapter 5 of this thesis. My empirical field-work followed the seminal studies of Elizabeth Eggleston in her ground-breaking research with Aboriginal people in Victoria, South Australia and Western Australia in the 1970's. See Eggleston, E, *Fear,Favour or Affection* (1976), Australian National University Press.

[8] Stroud, N, 'Non-adversarial justice: the changing role of courtroom participants in an Indigenous sentencing court' (2011). In Proceeding of the International Association of Forensic Linguists' Tenth Biennial Conference, edited by Tomin, S, MacLeod, N, Sousa-Silva, R and Coulthard, M, Birmingham, UK,, 115-25 at http://www.forensiclinguistics.net/iafl-10-proceedings.

[9] Transcript T9.34 (D).

culture and the law. The Elder explained to the Magistrate the background of the defendant and circumstances of the offence, and the Magistrate in this case was able to impart a more appropriate non-custodial sentence for the Koori offender.

In the third case study, the defendant first came to the Koori Court after passing through the criminal justice system over a period of many years. His story after contact with the Koori Court, is one that emphasises the importance of kinship and connection to culture, respect for the Elders of his Indigenous community, and the need to take the responsibility for his actions and change his behaviour. His rehabilitation and mentoring of young offenders is an example of how enhanced communication can have an impact on the outcome for a Koori offender. The case studies showed how enhanced communication had a positive impact for Koori offenders.

Chapter Seven drew together the selection of thematic responses in answer to a range of questions regarding features of language commonly known to be problematic for Aboriginal offenders in the mainstream system. These included questions on cross-cultural differences of politeness, identity, cultural assumptions, kinship obligations and differences in lexico-semantic meaning of an utterance.[10] These were reviewed and discussed, together with examples which show how an awareness and understanding of cultural and language difference, as occurs in the discourse in the Koori Court, ensures that the interactive communication is enhanced. My findings showed that the discourse in this court responds to changes in the linguistic style of speakers during the court process. There appeared to be a linguistic shift in the discursive practice, and the bicultural ability of some speakers contributed to increased and effective interaction.

It is clear from the responses of participants interviewed for this study, that the interactive process of the 'sentencing conversation' and the participation of Indigenous Elders and Respected Persons in the Koori Court, has had a marked effect on improving communication in the courtroom. Although the Koori Court has had some success in rehabilitating offenders and reducing reoffending over the past decade, more needs to be done in addressing the continuing

[10] See Chapter 4 for further information.

disadvantage experienced by Indigenous Australians which brings them into negative contact with the law. The observations of the 1991 Royal Commission, that 'the most significant contributing factor is the unequal position in which Aboriginal people find themselves in the society – socially, economically and culturally' is still relevant today.[11] The research shows that the way people interact at the court hearing enhances the perception of justice for all Aboriginal offenders, the courts and the community.

In drawing together the chapters that comprise this thesis, the underlying proposition is that the Koori Court is an appropriate and effective way of enhancing the administration of justice processes as they apply to Indigenous offenders. Although it is not a perfect process, the enhanced communication provides a strong foundation for proper application of criminal justice processes for the Indigenous community in Victoria.

IV Some Suggestions

While this thesis found that in the Koori Court, most participants were able to have a positive experience during the 'sentencing conversation', it is evident that Koori offenders in the mainstream court remain disadvantaged. The following provide some suggestions of practices which enhance the perception of justice for an Indigenous offender in the Koori Court and which may also be applied to other courts and jurisdictions.

One way to improve communication for Indigenous defendants in the mainstream courtroom is to encourage more cross-over of specially selected and culturally aware Judges and Magistrates who preside in both the Koori Courts and mainstream courts.[12] Magistrates in this study responded that when in the mainstream court they ask the defendant directly for background

[11] ALRC Report 2017, 61.
[12] The crossover of specially selected Judicial officers presiding between Koori Court and mainstream court enables increased interaction with an Indigenous offender prior to the sentencing outcome. (see Magistrates' Court of Victoria Annual Report, 2018-2019; and Judicial College of Victoria Annual Report 2018-2019).

information during a hearing rather than speak only to their lawyer.[13] They try to involve them in the process.

Further suggestions to assist Indigenous offenders who come to the court system include increased education in cultural awareness across all jurisdictions.[14] In addition, the continuation of the partnerships between government and the Indigenous community to improve justice outcomes for Aboriginal people in all areas where disadvantage is experienced, would also contribute to reducing the high number of Indigenous people in the court system. Most importantly, the implementation of the ALRC 2017 recommendations for law reform appears to be the key in restoring Indigenous confidence in the criminal justice system.

V Future Directions

Little has changed regarding Indigenous incarceration rates since the Royal Commission into Aboriginal Deaths in Custody[15] in 1991. Few of the 339 recommendations to address the over-representation of Aboriginal Australians in the criminal justice system have been fully implemented. The 2017 Australian Law Reform Commission Report nearly three decades later, found that the disproportionate incarceration rate of Aboriginal and Torres Strait Islander people is both a persistent and growing problem.[16] However, the ALRC Report commends the work of the Koori Court as a good example of Indigenous courts which support and assist Aboriginal and Torres Strait Islander people through the criminal justice process.[17] It is clear that the Koori Court, which involves the Koori Elders and local Indigenous community in the court process, is one of the things which work to support Indigenous offenders. Given the important role of the Koori Court, this thesis makes the following recommendations

[13] Transcript T3.60 (M).
[14] The Magistrates' Court, in close collaboration with the Judicial College of Victoria, conducts training programs, professional development and cultural education throughout the year for judicial officers in the Victorian justice system.
[15] Royal Commission into Aboriginal Deaths in Custody Report, 1991.
[16] ALRC Final Report 2017, 133, 21-22.
[17] Ibid, 24.

1. Continuation and expansion of the Koori Court program and increase in involvement of the Indigenous community.

2. Youth access to justice. The types of crime that start juvenile offenders on a path through the criminal justice system are often minor offences, but they often become involved in more serious crimes. Where possible, juveniles should be given a second chance to change behaviour after a first offence.

3. Where possible, Indigenous offenders need access to a culturally appropriate courtroom, court process and court practice as part of a fair hearing; culturally aware legal professionals who have participated in continuing education in cross-cultural awareness;[18] and access to follow-up services after sentencing.

4. Increase access to hearing loop technology in the courtroom for hearing impaired Indigenous participants.

5. Introduction of Justice Reinvestment programs in Victoria, similar to those operating in New South Wales, the UK and the USA, which redirect money spent on prisons to community-based initiatives which address underlying causes of crime.[19]

As mentioned earlier, it is pleasing to note that some specially selected Judges and Magistrates preside in both the Koori Courts and mainstream courts, resulting in a 'cross-over' of culturally aware practices. Both adversarial and non-adversarial practices have their place in the Criminal Justice System.

VI Discussion

This thesis illuminates the way language works in the Koori Court and also provides evidence that communication can be enhanced when time is allowed for marginalised people to speak, in a forum where others will listen. Although the number of face-to-face interviews conducted for this empirical study of communication in the criminal justice system is not extensive, when

[18] The Victorian Aboriginal Legal Service runs cultural education programs for lawyers (VALS Co-op Ltd. Annual Report, 2014-2015.
[19] ALRC Final Report 2017, 133, 125-144.

augmented with the researcher's observations (with detailed notes) at more than 200 court hearings over the period of the research, respondents' answers provide evidence-based findings of the way language can work in this usually formal domain. This validates my central claim that communication in the Koori Court enhances the conduct of justice for Aboriginal offenders, the courts and the community as a whole.

The four themes that emerged in Chapter Seven are thus essential. Firstly, cross-cultural aspects give a background to the study and inform the conclusion. Responses identified specific cross-cultural features which may have an impact on miscommunication in the mainstream court. When these features are understood and addressed in the Koori Court, this supports my findings that improved understanding leads to a better outcome for the Koori defendant.

Secondly, respondents all agreed that the courtroom plays an important part in the sentencing process, and this may have an impact on communication. For example, whether the layout of the court is formal or culturally sensitive; whether there is an imbalance of power or a forum where the offender may speak; or whether time is allowed to uncover any factors behind the offence which may be relevant to the case. Respondents agreed that in the Koori Court, all the above factors had an impact on the outcome for a Koori offender.

Thirdly, responses about the way people communicate highlighted a number of strategies for achieving increased participation at the 'sentencing conversation' between legal practitioners and Aboriginal speakers. Understanding that speakers with a different cultural background may use direct or indirect ways of responding to a question was discussed in detail in the chapter. Non-verbal body language was also noted as a factor which may be relevant to successful communication, particularly when cultural and language differences are understood.

And finally, when asked whether the Koori Court process encouraged interactive participation, respondents, both Indigenous and non-Indigenous, agreed that communication and interaction were important factors in achieving a successful outcome for a Koori defendant.[20] From the

[20] Stroud, N, 'The Indigenous Koori Court: Challenging Linguistic Conventions' (2017). Paper presented at the 13th Biennial Conference of the International Association of Forensic Linguists, Porto, Portugal, 10-14 July 2017.

defence point of view, it was observed 'communication goes much better when the conversation focuses more on the client's strengths as opposed to their deficits'.[21]

Koori Elders all considered that it was important that defendants who come to the court reconnect with their Koori community and learn of their heritage. The Elders encouraged rehabilitated Koories to mentor others, especially young Koories. In this way defendants regain an identity. One Koori Elder summed up most Elders' responses

> Of all the programs I've been involved with, this is one of the best. The name of the game is to keep our people out of jail, especially the young people.[22]

Respondents agreed that by the time the defendant gets to court, they have had a hard road, and the Aboriginal defendant has a harder road to traverse than most, with intergenerational issues, often poor health, homelessness, lack of education, and drug and alcohol dependence. Police prosecutors reported that in their opinion 'the overriding feeling within the room of a Koori Court was that all were working together as a team'.[23]

When all responses to questions on the effectiveness of communication in the Koori Court were considered, the findings showed that most participants interviewed for this research considered that communication in the Koori Court was enhanced due to the interaction and cooperation of all at the 'sentencing conversation'. The time allowed for the Magistrate to hear factors which may have led to the offence, enabled them to deliver a more appropriate sentence, and this also had an impact on the outcome for a Koori defendant.

To conclude, the following table summarises the four main themes of inquiry and the responses.

	Category	**Sub Themes**	**Responses**
A	Cross-Cultural Aspects	Identity, differences of politeness, cultural assumptions, habits, kinship obligation,	Responses positive on cross-cultural differences – how

[21] Transcript T14.58 (L).
[22] Transcript T2.104 (E).
[23] Transcript T6.6 (PP).

		unconscious linguistic conventions, bi-cultural ability, cultural empowerment, relationships	ameliorated; indirect speech, pre-suppositions
B	Courtroom Context	Formality, power imbalance, informal process, culturally sensitive layout, time to hear the story behind the offence, differences in the notion of time and place	Magistrates, Elders, defendants, court staff all said that the informal Koori Court created a safe place where the defendant could come before their Elders and tell their story
C	Communicative Style	Adapted legal register, narrative format, effective speaker/listener techniques, recognition of non-verbal language, attitude, lowered gaze, culturally specific gestures, different use of silence, lexico-semantic meaning of utterance	Respondents differed in some of their views. Acknowledged changes in attitude, different ways of communicating, recognition of indirect signals, contractions, slang
D	Interactive Communication	Interaction between all participants; conscious awareness of Indigenous speaking styles; cross-cultural courtroom discourse; involvement of Elders and Indigenous community essential; awareness of support after sentencing	Respondents all said interaction was good in the Koori Court. There was an awareness of communicative differences. Defendants felt that they had a voice and that people listened

Table 2 – Thematic Table of Features

VII Conclusion

This thesis illustrates the importance of listening to the voices heard in the Koori Court of Victoria. Thematic responses by participants of the four key areas of inquiry have provided a macro-cultural picture of communication as it occurs in the courtroom. Cross-cultural aspects such as identity and differences in politeness inform the thesis.

The Koori Court process covers a wide range of defendants and offences, also with variations in court location and formality. The formal legal register (or language) of the mainstream courtroom is adapted in this court by using a simplified communicative process which recognises the narrative format and group consensus of Indigenous participants.

Respondents' answers to research questions, provide evidence-based findings of the way language works in this cross-cultural domain. A micro-analysis of the level of communication between Aboriginal speakers and others in the criminal justice system revealed that the bi-

cultural ability of Aboriginal speakers present in the courtroom was shown to enhance communication, enabling differences in language to be understood and resolved.

This thesis shows the importance of the courtroom as a place where Indigenous defendants can come and tell their story and engage with the respected Elders of their community. Responses regarding the way people communicate highlighted a number of strategies for achieving increased participation at the 'sentencing conversation' between legal practitioners and Aboriginal speakers. Understanding that speakers with a different cultural background may use direct or indirect ways of responding is critical. Non-verbal body language may often be relevant to successful communication, particularly when cultural and language differences are understood. This substantiates the theory of sociolinguist John Gumperz, that when analysing cross-cultural communication, context is the key.[24]

The findings of this study can be applied to other jurisdictions in the criminal justice system. It shows the benefit of allowing time for all participants at the court hearing to listen to the narrative of the Aboriginal offender and gain an understanding of not only the problems which may have led them to offend, but learn more about the Aboriginal culture. It is clear that an awareness of language and cultural difference in the courtroom enhances communication and can have a positive impact on the sentencing outcome.

It is evident that the Koori Court has opened a new narrative of cross-cultural understanding in the justice system. Thus, communication in the Koori Court enhances the perceptions of justice for Aboriginal offenders, the courts and the community as a whole.

[24] Gumperz, J, *Discourse Strategies* (1982), Cambridge University Press.

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